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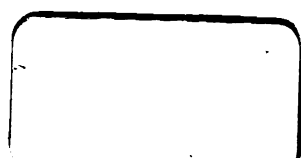
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THE
HOUSE OF LORDS CASES

ON

APPEALS AND WRITS OF ERROR,
AND CLAIMS OF PEERAGE,

DURING THE SESSIONS

1854, 1855, AND 1856.

By CHARLES CLARK, Esq.,
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.
BY APPOINTMENT OF THE HOUSE OF LORDS.

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JUDGES. AND LAW OFFICERS

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
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CASES

IN THE

HOUSE OF LORDS.

MAYOR OF SOUTHMOLTON v. ATTORNEY-GENERAL.

1854. May 1, 2.

THE MAYOR, ALDERMEN, and BURGESSES of South-	}	<i>Appellants.</i>
molton,		
THE ATTORNEY-GENERAL, at the Relation of JAMES	}	<i>Respondent.</i>
MILES and others, ¹		

Charity. "Surplus." "Residue." Parties. Costs.

It is a question to be determined by the particular words of each will, whether a gift of "surplus" or "residue" means surplus or residue properly so called, or a mere proportional share of a particular fund. Where, after the gift of a fund charged with certain payments, the words were, "and the overplus which the said, &c. do produce more than all these disbursements do amount to (which I do find and compute to be about 60*l.* per annum"), they were held to mean surplus, and not proportional share.

If a charity is entitled to a particular sum as a first charge on an estate given to certain persons, and the estate is amply sufficient to secure payment of that sum, the fact that a portion of the estate has been lost by the alleged negligence of the donees of the estate will not of itself justify an information on behalf of the charity against such donees.

Where a portion of an estate held under such circumstances was charged to have been improperly sold, the purchasers must be included as parties in any such information.

Where such portion consisted of land held upon a renewable lease, and the lessors were entitled to refuse a renewal, and the bargain was in fact made with them before the period for renewal arrived, such bargain, made under such circumstances, does not afford matter of complaint against the donees of the estate.

* 2 * In an information against the donees of a fund on which there was a

¹ *Beverley v. Attorney-General*, 6 H. L. Cas. 328, 331; *Attorney-General v. Dean, &c. of Windsor*, 8 H. L. Cas. 381.

charge for the benefit of a charity, the prayer of the information was granted, and inquiries were directed. This House reversed the decree of the Court below, and ordered the information to be dismissed, but only with costs up to the hearing, upon the ground that the Court below having directed the inquiries, the relator was entitled to proceed upon that direction.

THIS was an appeal against a decree of the Master of the Rolls.

In 1686, Hugh Squier, a native of the town of Southmolton, but then resident in Westminster, formed the design of establishing a free school in his native town, and built there a schoolhouse, and a residence for the master. In October of that year he executed an indenture, by which he constituted certain persons, living in and near the town, trustees for the school, and assigned them the schoolhouse and master's residence, for the residue of a term of 2,000 years. The indenture proceeded thus: "And whereas the said Hugh Squier doth intend and will settle 1000*l.* of lawful English money, or land of that value, for the better support of the said school and schoolmaster, and the repairing of the said premises, which said money, or lands, so to be settled, and the free school and other the premises hereinbefore mentioned to be granted, shall, nevertheless, be in the said trustees, their heirs and successors, on the trusts," &c., thereafter declared. The trustees were "to elect twenty poor people's children, which shall be taught in the said school gratis (and without premium to the schoolmaster for their learning) the most necessary and good arts of writing and arithmetic." The trustees were to fill up vacancies in the number of twenty by fresh elections. So long as the master had twenty scholars in the school to be taught gratis, he might teach others on payment, to the intent that the people of the "whole country near adjacent might have the convenience

*3 of an extraordinary *good school to send their sons and daughters to"; and that "when this school shall be grown famous and populous, the town of Southmolton may be the better for boarding such gentlemen's sons as shall be thither sent to school." Latin and grammar were also to be permitted to be taught, but to the intent that "the writing schoolmaster shall always have the greatest encouragement, the writing schoolmaster for the time being shall always have the dwelling-house built with and adjoining to the school, for his habitation, and the privilege of teaching his scholars in the school, and 20*l. de claro*, out of what the said school shall be endowed withal; and the Latin school-

master shall have only 20*l.* per annum of the said revenue, and the privilege to teach his Latin scholars in the same school also." The deed then recited the intention of Squier to endow the school with a sum of about 50*l.* per annum, of which 40*l.* were to go to the schoolmasters, 3*l.* for two annual feasts to the trustees, and the remaining 7*l.* towards the reparation, or improvement, of the premises. To secure due obedience to his will, Squier directed that when "these rules do cease to be observed for one whole year, the endowment of 50*l.* per annum shall become the proper estate of the King's Hospital of Greencoat Boys, in Tothill Street Westminster."

By a memorandum indorsed upon this indenture, Mr. Squier directed that if the then revenue should in future fall short of his and the trustees' expectations, all such failure should be abated wholly out of the schoolmaster's salary, and be (while there were two schoolmasters) equally divided between them.

The trustees or governors were always to be inhabitants of the own or parish of Southmolton, and any governor ceasing to be such inhabitant should cease to be a governor. The design of having a Latin schoolmaster seems to have been afterwards abandoned.

* Mr. Squier, by his will dated the 23d day of February, * 4 1709, after reciting the founding of the school and its then prosperity, increased the number of free scholars from twenty to thirty, and directed the trustees (upon the assumption that they were to receive the rents of certain estates at Northam, and Upcott, and Westminster) to pay the rent and tenths, and the fine for the renewal of the lease of his estate at Northam, to the Dean and Canons of Windsor, and for this duty each trustee was to receive the sum of 20*s.* per annum. The testator then proceeded: "And for the defraying of this charge, and for the aforesaid intent and purpose, and also to the further uses that are hereinafter expressed, I do give and bequeath unto the mayor and aldermen of the borough of Southmolton, in Devon, and to their successors for ever, all my right, title, interest, and estate, which I have, or hereafter shall have, in the parish of Northam, in Devon, except the presentation, which is reserved for reasons which hereinafter are expressed, provided and upon condition that they do permit — Ayres, the present vicar of that parish, and his successors for ever, to enjoy the vicarage house, &c., &c., and do pay him and his successors 16*l.* per annum by quarterly payments; and do also

pay the above-mentioned sums which the church of Windsor doth usually and reasonably require for a fine upon every such renewing of their lease, as their custom of renewing is; and do also pay 5*l.* 15*s.* per annum yearly unto George Whicher his almshouses in Westminster; and also do pay 40*l.* per annum towards the maintenance of Southmolton Free School, that is to say, 25*l.* to the schoolmaster, 5*l.* to the trustees, 3*l.* for their two usual feasts at their visitation, and 7*l.* for the reparations of the school and schoolhouse, and the highways between the schoolhouse and Mole Bridge, in all 40*l.* per annum; and the overplus which the said

Upcott and Northam do produce beyond and more than all * 5 these * disbursements do amount unto (which I do find and compute to be about 60*l.* per annum) shall go the one half thereof always unto him who is and shall be mayor of Southmolton for the time being, towards the expenses of mayoralty, and the other half towards the mending of the highways in and near the town of Southmolton, in Devon. And whereas I stand possessed of three houses in St. Martin's-le-Grand, London, which are held by lease from the Dean and Chapter of Westminster, which will expire about thirty-eight years hence, and are intended to be renewed by the vestry of St. Margaret, Westminster, from time to time in such manner as they renew many other leases which they have from the said church, I do hereby give the same three houses, with all my right, title, and interest therein, unto the said vestry of the parish of St. Margaret, Westminster, and their successors for ever (my executors receiving first all the rents that shall grow due until the next quarter-day after my death for their own use), and I do appropriate the same to the uses hereafter named." He then made other gifts, and referred to the houses, &c. which he held on renewable leases in Westminster, and enumerated payments to be made thereout, and proceeded as follows: "And because that several sums, whilst they stand written in words at length, and until they are set down in figures (the one sum under the other) cannot well be cast up, therefore I have drawn up several accounts, the one of all I have now given unto the Corporation of Southmolton, in Devon, and to the free school which I built there, about twenty-eight years ago; and the other of all that I have given unto the parish of St. Margaret, Westminster: both of these accounts I do make to be part of this my will, and my will and meaning is, that all what I have given unto the Corporation of South-

molton and to the free school which I built there, shall be delivered over unto them by my executors from the time of my death."

* The following are the accounts referred to in the will: — * 6

"An Account of the Product and of the Outgoings of all the Things which I have bestowed on the Corporation of Southmolton and the Free School I built there.

INCOME.	THE OUTGOINGS.
<p>Of all my estate in Northam, except the patronage and chusing their ministers upon all occasions, which I do give to the parish itself £ s. d. 125 0 0</p> <p>All my estate in Upcott, being better than inheritance, per annum 15 0 0</p> <p>A rent charge upon the vestry and parish of St. Margaret, Westminster, which they are to pay once a year out of 83<i>l.</i> per annum, which I have settled upon them for this and some other good uses 20 0 0</p>	<p>For the five trustees 20<i>s.</i> per annum a piece for their particular care in governing the school, in receiving their rents, in paying the high rent every year, and the accustomed fines, either at four or seven years' end, by which your estate will become perpetual, and the same as Mr. Haach for the sheaf of S<i>m</i>olton £ s. d. 5 0 0</p> <p>To their schoolmaster of this free school from the time of my death, per annum only 25 0 0</p> <p>For their two usual feasts of visitation of the school, per annum 3 0 0</p> <p>For reparation of the school and schoolhouse, and the lands before it, per annum 7 0 0</p> <p>To the Church of Windsor every year for their high rents, and tenths, &c. 29 2 9</p> <p>For a fine of 15<i>l.</i> once in four years, and 3<i>l.</i> 17<i>s.</i> 10<i>d.</i> charges for making every new lease, in all 18<i>l.</i> 17<i>s.</i> 10<i>d.</i>, at every four years' end, one fourth part whereof is 4 14 5½</p> <p>To the Vicar of Northam and his successors for the time being, per annum 16 0 0</p> <p>Also to the executors of George Whicher's almshouses in Westminster, per annum 5 15 0</p> <p>Balance which the Corporation of Southmolton will gain per annum, excepting 13<i>l.</i> 8<i>s.</i> per annum land tax whilst that lasteth, and the poor's rate, whereof the tenant (by his lease) pays the moiety 64 7 9½</p>
<p>In all per annum £ 160 0 0</p>	<p>£ 160 0 0</p>

If the taxes to church and poor do not abate somewhat thereof, but the Parliament do use to exempt Windsor, and schools, and almshouses from taxes; but whatever the balance (*de claro*) proves to be more or less, the half thereof is given every year to him that shall be Mr. Mayor in being, and the other half towards mending the highways in or near Southmolton, especially between Mole Bridge and the schoolhouse.

Item. — I do desire the corporation, out of their 64*l.* 7*s.* 9½*d.*, to pay for the children's pens, ink, and paper."

* 7 * In another paper, called "An Account of the Product and of the Outgoings of my Houses in St. Martin's-le-Grand, London."

The testator inserted the following item on the "outgoing" side of the account: "Payable more to the five trustees that belong to the free school which I built at Southmolton, in Devon, to be added to the revenue which I have heretofore given to that free school, for the maintenance per annum to be paid here once a year, 20*l.*"

At the time Mr. Squier made his will the property at Northam and Upcott was worth 140*l.* a year; it has since increased in value to 734*l.* 7*s.* 6*d.* a year. This is exclusive of a piece of that property which was surrendered in 1839 to the Dean and Canons of Windsor, and which at the time of the surrender was of the value of 44*l.* a year. The surrender was made because the Dean and Canons had been applied to by the inhabitants of Appledore, where the land lay, to appropriate that land to the purpose of erecting a chapel of ease for the parish. The sum given as the consideration for the surrender was 516*l.*, which sum was received by the corporation, and since the passing of the Municipal Reform Act the whole surplus income, after paying the several specific sums before mentioned, had been paid into "The Borough Fund," and applied to the ordinary purposes of the corporation.

The annual rent of 20*l.* payable by the parish of St. Margaret's had not been paid since 1803, because the vestry neglected to renew the lease in consequence of an agreement with the Dean and Chapter of Westminster.

In April, 1850, the Attorney-General, at the relation of James Miles, of the King's Road, Chelsea, filed an information in the * 8 Court of Chancery against the Mayor and * Corporation of Southmolton, and against the trustees of the school, praying that it might be declared that the lands, &c. devised by the will

of Squier were held for charitable purposes only, and not for the purposes of the corporation; and that accounts might be taken, especially with regard to the property surrendered to the Dean and Canons of Windsor; and that it might be declared that the rents, &c. were applicable, and ought to have been applied, for the support of the charities mentioned in the will, in the proportion which the original amount devised to each charitable purpose bore to the whole income and revenue of the said lands, and that the Master might be directed to settle a scheme for the regulation and management of the school and due appropriation of the revenues thereof, having regard to change of time and circumstances.

An answer having been put in, the cause came on to be heard before the Master of the Rolls on the 25th of June, 1851, when his Honour was pleased to declare, that according to the true construction of the will of the testator, the free school, and the several persons and other objects to whom or in whose favour the rents and profits of the estate and property given or bequeathed in trust to the appellants were given or directed to be paid and applied, were formerly and then entitled to participate in the increased rents and profits of the said estates and property in the proportions in which the rents and profits thereof at the date of the said will were given or directed to be paid or applied to or for them respectively. An account was ordered as to the property, including that which had been surrendered, and other directions were given in conformity with this declaration. This was the decree appealed against.

* *The Solicitor-General (Sir R. Bethell)* and *Mr. E. K. Karlake* for the appellants. — The question in this case is, whether on a devise of property charged with payments for the purposes of charity, and then a gift of the surplus to the devisees, they are entitled to any augmentations that may take place in the amount of the surplus after the payments specifically ordered have been duly discharged. The Master of the Rolls thought that they were not entitled to these augmentations, because the gift of the surplus was not a mere gift of surplus as such, but was a gift of surplus estimated to amount to a certain sum, and was therefore limited to a sum to be calculated on a proportional scale. He seemed to suppose, that by stating the amount of the surplus the

testator had specified what it was to be, and had made it a definite proportion, uncertain only from having indefinite charges upon it, so that the corporation could only take its proportion of the increased rents. This was giving to the words of the testator an effect which he never intended; his intention must govern here as in other cases of devise, and from the whole will taken together it is plain that he merely intended to benefit the town of Southmolton as represented by the corporation, and that one of the means of doing it was by establishing a school there, and when he had provided the payments necessary for the maintenance of the school, and of certain other objects of his bounty, he summed them up together and stated what he thought would still be the amount of profit derivable by the mayor and corporation from the estate which he had given them. His estimate of the probable amount of the surplus did not in the least degree affect the right of the corporation to the whole surplus.

This case must be governed by that of *The Attorney-General v. Brazen Nose College*,¹ where all the authorities were discussed. This is a gift of the estate subject to a charge upon it. It is clear that the charity would not suffer so long as the estate was sufficient to make the prescribed payment, while, on the other hand, that payment must be made though it should absorb the whole of the surplus. That being so, the corporation is entitled, even on the principle stated in the *Thetford School Case*,² to the benefit of any increase, since on the corporation would fall the burden of any loss.

Where an estate is given to particular individuals or to a corporation, and sums are charged upon it for the benefit of certain charities, but such sums do not exhaust the estate, the surplus, whether expressly mentioned or not, will go to the donees of that estate. *The Attorney-General v. The Mayor of Bristol*;³ *The Attorney-General v. Smythies*;⁴ *The Attorney-General v. The Cordwainers' Company*;⁵ *The Attorney-General v. The Grocers' Company*.⁶

The Master of the Rolls treated this, not as a gift to the Corporation of Southmolton on condition of paying so much a year to certain specified objects of the testator's bounty, but as a mere trust. And so treating it he held himself bound by the authority

¹ 2 Clark & F. 295.

² 8 Rep. 130 b.

³ 2 Jac. & W. 294, reversing 3 Madd. 319.

⁴ 2 Russ. & M. 717.

⁵ 3 Mylne & K. 534.

⁶ 6 Beav. 526.

of the case of *The Attorney-General v. The Drapers' Company*;¹ but that case is not in point, for there money was given to a company to purchase lands of the clear value of 100*l.* a year, and the testator gave 96*l.* to different charities, “ and the residue of the said sum of 100*l.*, being 4*l.* yearly, to the company for their pains.” There the whole sum was specifically * disposed of, * 11 and the specified parties, of course, took the increase proportionably: that is not so here. In the case of the Drapers' Company, had there been a decrease of the income, the 4*l.* would not have been primarily liable to make good the loss to the rest, but all would have suffered alike. There, too, the sum given was exhausted by the specific gifts, which is not the case here, so that assuming that case to have been well decided it does not govern the present.

Mr. Rolt and *Mr. Morris* for the respondents. — The admitted principle in these cases is, that where the annual value of the fund is ascertained, and exhausted by the payments specifically directed to be made out of it, all the objects of the bequest share in the increase, or suffer from the decrease. This principle is applicable, no matter in what form of words a testator has expressed himself. If a testator has property to the amount of 160*l.*, and his intention to dispose of property of that value is clear, and he gives 50*l.* a year to one charity, and 50*l.* to another, and the residue, without mentioning its amount, to a third, the principle applicable to the construction of his will is the same as if he had mentioned the particular sum to be received by each. It is the same whether the last sum is given under the name of residue or not. The whole fund is apportioned among the donees according to the proportions described in the gift, and their benefits will increase or decrease accordingly. The rule applies with equal force if the whole estate is given to feoffees or trustees, and they are directed to pay two sums to two charities, and to retain the remainder for themselves. Nor will the rule be affected by the circumstance that the testator may have made some mistake as to the value of the property, nor that one of the proportions given is made * in form a * 12 specific charge, nor that the residue is given without its amount being specified. A Court has only to see that the donor contemplated giving the fund in settled proportions, and then the

¹ 4 Beav. 67.

consequence ensues. It is clear in this case that the whole fund was so given, and the testator specified the amount of the surplus.

In the Court below it was contended that this fund was not so appropriated, but was given on condition; it is clear, however, that it was a mere trust. The person who accepted the estate took it therefore with the burden of discharging the trust, and it makes no difference that he was himself to receive a benefit. But then it is said on the other side, that the uncertainty in the sum to be received by the corporation shows that the corporation was to receive a residue which was necessarily always fluctuating in amount, subject to decrease if the funds out of which the payments were to be made should decrease, or the charges thereon become more considerable, and therefore properly to be increased if the fund should, after payment of those charges, leave a larger surplus. But in truth, that argument is inapplicable, for it is clear that the testator supposed that the specific sums he gave would exhaust the whole fund, and he applied that fund to those payments in certain definite proportions. The rule that where the ultimate takers are feoffees or trustees, who must pay the charges out of whatever they receive, they are entitled to all the surplus they may get, does not therefore apply, for all the persons to be benefited here are liable to suffer loss.

Then what are the cases which are supposed to favour these claims by the corporation. *The Attorney-General v. The Mayor of Bristol*¹ is the first. There the sum of money to be paid by * 13 the corporation was exactly ascertained * by the settlor, and there being no declared gift of the residue, the question was, to whom it would go; it was clear that the estate was given to the corporation, and therefore the corporation, having paid the specific charges on it, was entitled to the surplus. But in that case it was said by Lord Eldon:² " Recollecting that there is not one single case, at least I have not been able to find one, where the doctrine to be found in the *Thetford Case* has been applied, except where the value, or what was represented to be the value, was distributed at the time, and recollecting that Bristol was a material and prominent object of the bounty of the author of this gift, is this not a case which falls within the range of those cases in which property

¹ 2 Jac. & W. 294; see the deeds fully set out in 3 Madd. 319.

² 2 Jac. & W. 332.

given to a corporate body, is given to it, subject only to the charges imposed, and not as a mere trustee?" The facts of that case render it inapplicable to the present; and the words of the judgment now referred to explain the principle on which Lord Eldon proceeded. All the payments to be made out of the fund were distinctly ascertained by the settlor, and those payments left a clear surplus to the donee of the fund, and the amount constituting the surplus or residue was not ascertained.

[THE LORD CHANCELLOR. — Though the testator there does not state the amount of the residue, he does state the amount of the whole property, and then the particular charges upon it, so that the statement of the residue is necessarily implied.]

The next case is that of *The Attorney-General v. Smythies*.¹ The facts there are important. The corporation consisted of a master and five poor persons; all that was given to the poor persons was a specified annual sum of 52s., to be paid by the master to each, and then *came a general direction that the funds *14 then or thereafter given should be expended for the support of the master and poor of the college for the time being, and for the repair and maintenance of the college, &c., and for no other purposes. The contention was, that the five poor persons should receive a proportionate share of the increased rents of the land. Nothing whatever was there said of residue. The ultimate decision was against the increased apportionment among the poor persons; but that decision proceeded on the particular words of the gift, for the principles stated in judgment were all in favour of the apportionment. The words, however, in that particular case were held to show that² "it was a gift of the whole to the master and paupers, the amount receivable by the latter being ascertained, that receivable by the former unascertained; in other words, the surplus being the master's, after paying the paupers and providing for the repairs." Here both the sums are ascertained, and the surplus is stated in the will of the testator himself. That case therefore is really in favour of the respondents. The whole fund here was given for purposes of charity which it was thought could be provided for by the assumed proportions then settled for the objects of the testator's bounty. The case of *The Attorney-General v. Brazen Nose*³ is inapplicable. There the amount of the property

¹ 2 Russ. & M. 717.

² 2 Clark & F. 295.

³ 2 Russ. & M. 742.

was ascertained, and fixed sums were to be paid to the scholars, but nothing was said of the mode of disposing of the balance which those sums did not exhaust, and the donees of the property having satisfied the particular charges were held entitled to retain it. It was there remarked,¹ that in the Brazen Nose College, as in the

Atherstone school case, "the school had only a charge upon
* 15 the revenues in a * certain way, but at the discretion of the governors, so that the surplus would belong as property to the governors." *Jack v. Burnett*² is in the same position. In no

one instance was the amount of property there stated, and the donees of the property were held bound to perform a certain condition, but not to perform more. There is no such restricted obligation in the present case. Apply to this case the rule which would be applicable in a case not of a charity, and the decision must be in favour of the respondents. In *Page v. Leapingwell*³ there was a devise to sell, but not for less than 10,000*l.*, and to pay several sums to different legatees, amounting to 7800*l.*, and the overplus monies arising from the sale were to go to A. This was held to be a specific legacy of 10,000*l.*, and the sale producing less, A. and all the others were to abate in proportion. That case proceeded upon the principle, that where the testator has indicated his intention of dividing the benefits among all, that intention is to be exactly followed, and the proportions of the gift being once declared, they are to be always observed, whether the sums on which they have been calculated have been rightly or wrongly ascertained, or even not ascertained at all. The case of a gift to a charity must be governed by the same principle. The case of *The Attorney-General v. The Drapers' Company*⁴ is exactly in point with the present, for there, as here, the sums were ascertained, and the amount of the surplus stated in the will. The next case in the same book, *The Attorney-General v. Christ's Hospital*,⁵ is one in which the amount of the property devised to the hospital was stated in the will, and that amount was divided into specific sums,

which were to be paid to certain objects of the testatrix's
* 16 bounty. The rent of the property * increased, and it was held that the hospital was not entitled to share in the increase.

¹ 2 Clark & F. 325.
12 Clark & F. 812.
18 Ves. 463.

⁴ 4 Beav. 67.

⁵ 4 Beav. 73.

[LORD ST. LEONARDS. — What would have been the construction of the will if there had been no gift of residue?]

The whole would have been for the benefit of the school. The town would only have benefited through the school, and that was the intention of the testator.

[THE LORD CHANCELLOR. — What are the proportions that you say are intended? The sum here stated as residue is an odd sum. How could that be calculated as giving proportions?]

It might be inconvenient to make the calculations, but that would not affect the argument. It must be assumed that the proportion meant by the testator was, what he said, namely, "about 60*l*."

[LORD ST. LEONARDS. — That is rather against your general argument.]

No. It is an answer to the difficulty about calculating the fractional part. There is nothing in the circumstance that one of the proportions is called residue, nor that the amount of the property may be inaccurately stated. The indenture under which Squier established the school must be considered, in order to ascertain his intentions. There the testator intimates¹ that there will be provided for the school a sum of about 50*l*. per annum, out of which he allows 3*l*. to defray the charges of the two annual feasts, and 7*l*. towards the reparation of the school, and the premises; and he distinctly shows that he means the two masters to divide the bulk of the income in equal proportions. The one instrument is not absolutely to be construed by the other, but both are to be considered together as indicating what was his real intention.

* The will does not give the property to the mayor and corporation, but makes them merely legal feoffees for a particular purpose: it gives the property for the purposes of the trusts; it is said to be given to "the corporation and the school," which are thus placed on the same footing. It is not therefore given for the benefit of the corporation as corporation. The repairing of the roads was intended to be for the benefit of the school, quite as much as for that of the town at large, for the roads to be repaired are not the roads in all directions round the town, but those in the immediate neighbourhood of the school are specially mentioned. The Master of the Rolls says: "This is a definite proportion, with indefinite charges upon it," which is a true description of the case,

¹ See ante, p. 3.

and exactly accounts for the fluctuating amount of the balance, and this is remarkably shown in the provision in the account in which, after the amount of the anticipated balance has been stated, the pens, ink, and paper are ordered to be paid for by the corporation out of that balance. The sentence at the end of the second account¹ is another indication of his intention to favour the school.

[LORD ST. LEONARDS. — Suppose there had been a general decrease in the gross funds, on what would that decrease have fallen? THE LORD CHANCELLOR. — Or suppose the fines had been doubled, on what fund would that increased charge have fallen?]

On the whole fund. Every thing in the indenture and will speaks of proportion, and all must have borne the loss alike. The case of *Arnold v. The Attorney-General*² is in point. That was a devise to certain persons to pay to charities sums therein named, which, on the whole, amounted to 120*l.* a year. The land was found to be worth much more, and the heir at law of the *18 testator *claimed the surplus, but the Court held that the whole land had been devised for the charitable uses. Still more so is the *Sutton Colefield Case*,³ where lands of the value of 3*l.* per annum were given to maintain a schoolmaster, and afterwards, when the value of the lands very much increased, the income was held to be solely applicable to that purpose. *The Attorney-General v. Johnson*,⁴ and *The Attorney-General v. The Mayor of Coventry*,⁵ the latter of which was a decision in this House, reversing a former decision in the Court of Chancery, are to the same effect, and must be overruled, if the present judgment is not affirmed.

The Solicitor-General replied.

THE LORD CHANCELLOR. — In this case which was opened yesterday, an opportunity has been afforded us of looking into the authorities, and I therefore feel no difficulty in moving your Lordships to come to a decision at once.

I cannot but think that this decree, which I for one conceive to

¹ Ante, p. 7.

² Show. P. C. 22.

³ 7 Brown, P. C. 235.

⁴ Duke's Char. Us. 68.

⁵ Ambler, 190. See also *Attorney-General v. Sparks*, Ambler, 201.

be erroneous, was pronounced in consequence of the attention of the very learned Judge by whom it was made having been directed into somewhat an erroneous channel; because I observe that the arguments seem to have turned on the question, whether this is what is called a condition, or a trust? That question is entirely beside the merits of the case, in which the only point really to be decided is, what were the intentions of the testator, legitimately to be collected from the words of his will?

* Assuming that there had been no decisions on the subject * 19 of these charitable cases, but that we were now deciding this question for the first time, I believe that there could be no two opinions upon it. The language appears to me to be so perfectly clear, that nothing but the supposed effect of former decisions can at all raise a doubt about the matter. Let us first consider the case without reference to those decisions.

This testator having an interest in the town of Southmolton, had, about twenty-five years before the date of his will, erected a school there, for the purpose of having reading, writing, and arithmetic taught; in some degree, too, it was a classical school. By his will he appropriates certain property, which he desires shall be held for keeping up the school; and the way in which he does so is this: [His Lordship read the will.¹]

Now, supposing it had ended there, and that there was no authority fettering your Lordships' judgment, I should ask with confidence whether anybody could doubt that what was to go to the school was the gift of 40*l.* a year, and that whatever the surplus was, be it more or less, it was to go, one half to the mayor, and the other half towards keeping in repair the highways? If it had rested on that part of the will I should have said there was not the least doubt on the subject; but if it could have been considered doubtful, it seems to me that any possible doubt (independently of the authorities) would be cleared up by what follows at the foot of the will, which is this: The testator remarking that it would be difficult to tell, until he had reduced the account into a tabular form, what the fractions were, refers to an account which he proposes to add, and does add, at the foot of his will: "An account * of the product, and of the outgoings of all the things * 20 which I have bestowed on the Corporation of Southmolton, and the free school I built there." He had given this property to

¹ See ante, p. 4.

the Corporation of Southmolton for the benefit of the free school. But some attempt is made to raise a doubt upon the expressions, as if he had given it to the school as well as to the corporation. That is reasoning upon the words in a way that I cannot quite understand. He had given it to the corporation, for the benefit, to a certain extent, of the school ; but also for other purposes, and for the benefit of the mayor, who was a member of the corporation. That is the loose way in which he describes the account. He puts the estate at Northam as of the value of 125*l.*, that at Upcott at 15*l.*, and then there is a rent charge upon the parish of St. Margaret, Westminster, of 20*l.*, making altogether 160*l.* On the other side there are the outgoings ; he enumerates the 40*l.*, in different proportions, for the school ; then he states the rent payable to the Dean and Chapter of Windsor ; he estimates the fines payable every four years at 4*l.* 14*s.* 5½*d.*, the payment to the vicar 16*l.* a year, to the almshouses at Westminster 5*l.* 15*s.*, and then he adds : “ Balance which the Corporation of Southmolton will gain per annum, excepting 18*l.* 8*s.* per annum land tax, whilst that lasteth, and the poor’s rate, whereof the tenant (by his lease) pays the moiety, 64*l.* 7*s.* 9½*d.*” That is what he describes as the sum which the Corporation of Southmolton will gain. What does that mean, supposing it had stopped there ? Does not that clearly show that he estimated the estate as then worth 160*l.* a year ? He appropriates all these different disbursements, some of which will certainly for ever remain the same, namely, the rent payable to the Dean and Chapter of Windsor (the fines of course would be

* 21 fluctuating), and then he states this as the * balance which the Corporation of Southmolton will gain, except that there will be certain appropriations for land tax and poor’s rate. Can any one doubt that what he means is, that the corporation, on receiving this rent, is to pay 40*l.* in the way he puts it ; to pay the fines, whatever they may be ; to pay the sums to the vicar, and to the almshouses, and then that the balance is what the corporation will gain for corporation purposes and for the highways ? The testator must have been aware that the gross amount (not the 64*l.* 7*s.* 9½*d.*), upon which the balance was to be calculated, would fluctuate, because the fines would vary. But he likewise thought that possibly something else might vary, for he adds a suggestion, that the taxes to church and poor may abate somewhat ; but at all events, “ whatever the balance proves to be, more or less, the half

thereof is given every year to him that shall be Mr. Mayor in being, and the other half towards mending the highways in or near Southmolton." I cannot imagine language that a testator could adopt more directly and more pointedly alluding to the circumstance that he did not want to have any question raised about whether the balance was 60*l.* or 64*l.*, or whatever it might be. An unlearned person who knew nothing whatever of the decisions that have taken place on the subject of these charitable questions could not have a doubt about it.

I must not, however, overlook the circumstance that the Master of the Rolls, in alluding to this note, interprets this expression of doubt as to the amount of the balance, not in the way in which I should interpret it, as meaning to say, in a general way, that it will fluctuate from different causes, but, putting the question in a very neat way, he considers that the sum of 64*l.* 7*s.* 9½*d.* is represented as a definite proportion, subject to indefinite charges. Then he says, *although the sum to be received *22 might fluctuate, that will not be because the proportion 64*l.*

7*s.* 9½*d.* will vary, but because the charges upon that sum will vary. I confess I think there is an undue refinement in that, and that, in truth, that is not a correct view of the case, because the 64*l.* 7*s.* 9½*d.* may vary by reason of the fluctuating nature of the fines which have to be paid. Although the testator estimates what they were at that time, it cannot have been absent from his mind that any change in them would make this balance vary, and although his language is not, perhaps, the most accurate, yet when I see that his object was to constitute a surplus, after payment of these disbursements, it seems to me to be a matter that, independently of authority, does not admit of doubt. Everybody would say that, after the various payments previously mentioned have been made, the surplus, be it more or less, the corporation is to take for itself.

Then is there any thing in the authorities which have been quoted that compels your Lordships to do that which it is always most distressing to do, namely, to decide that a testator's language is to be interpreted as meaning something which we feel is not what he really meant, but in all probability is exactly the contrary of what he meant? The principle which has been relied upon for inducing such a necessity (a very sad necessity if it should exist) is that there has been a current of authorities which has led to

putting a particular construction upon language of this sort, and which must govern the present case. I agree with what was said by Lord Eldon, that where there has been such a current of authorities, or a single old authority very long acted upon, however anomalous, it is much more to the interest of mankind that

it should be followed rather than that Courts should, in each * 23 case, speculate on * whether it is right or wrong, and adopt in each a construction apparently more reasonable and more in accordance with modern times. But I see nothing in any of the authorities which necessarily leads to such a conclusion. Let me now consider them.

The earliest authority is the *Thetford School Case*.¹ That was a case in which a testator gave an estate worth 35*l.* a year for charitable purposes, for the maintenance of a preacher, a schoolmaster, and ushers, and for certain poor people, and he distributed the whole 35*l.* a year amongst them. In the course of time, the property rose in value, and became worth 100*l.* a year; and the question then was, whether any thing more was given to the charity than the 35*l.* a year. The question was a comparatively new one at that time, and after an elaborate argument, it was decided that, although the sum of 35*l.* a year was all that had been so apportioned, it was because that sum was all that the estate then produced. The estate was given for the maintenance expressly of the schoolmaster, the usher, and other persons, and the whole was held to be given, and not a part only. In referring to similar cases, Lord Eldon has remarked, that it may be very doubtful whether that or any other case having a similar aspect would, if now for the first time presented for consideration, be decided in the same way. I do not know how that might be, but it appears to me that that case has not the least resemblance to the present. If this testator had said, "I mean to give my estates at Northam and Upcott, now worth 160*l.* a year, for the benefit of the school which I have established at Southmolton, and I give 50*l.* a year to the master, and 50*l.* to the usher, and 60*l.*

to" so and so, apportioning the whole, then that case would * 24 govern the present. If it had * now risen to the value, as the relator here alleges, of 800*l.* a year, the whole would be so apportioned. But here there is nothing of the sort. The testator makes a distinction between what he appropriates to the

¹ 8 Rep. 180 b, Duke's Ch. Us. 71.

school, and the surplus, which he has given, not to the school, but to the corporation. That case really does not touch the present.

The *Thetford Case* was followed by others where the estate was given for charitable purposes, and certain specified portions of the rents were appropriated in a particular way. Such are the cases of *The Attorney-General v. Arnold*,¹ and *The Attorney-General v. Johnson*,² and the Courts in considering those cases always found their way to the conclusion (whether correctly or not, we have not now to decide), that although that which was appropriated might not be at the time the whole of the rent, yet, if the whole was intended to be dedicated, the surplus must be applied by the Court in the same manner. Such cases have no bearing on the present.

There arose in more modern times the cases of *The Attorney-General v. Smythies*,³ *The Attorney-General v. Brazen Nose College*,⁴ and *The Attorney-General v. The Mayor of Bristol*,⁵ in which the tendency of the decisions went exactly in the opposite direction. Those were cases where estates or sums of money had been given to charities, and the surplus given to somebody else, and in those cases it was held, that there was nothing whatever in the doctrine of the *Thetford School Case*, or the cases of *The Attorney-General v. Coventry*, or *The Attorney-General v. Arnold*, or *The Attorney-General v. Johnson*, to compel the Court to say that the parties to whom the surplus was * so * 25 given did not take it, as it was expressed they should take it, for their own use and benefit.

Then comes *The Attorney-General v. The Drapers' Company*,⁶ the case before Lord Langdale, on which the respondents so much rely, and which they say is so conclusive, that this case cannot be decided differently without overruling it. In that case the testator gave a sum of money to certain persons, with directions that they should, out of it, purchase land which should yield a net income of 100*l.* a year, and then the rent was apportioned among several distinct charitable objects to the extent of 96*l.* a year, and as to the residue, being 4*l.* a year, the testator gave it to the trus-

¹ Show. P. C. 22.

² Ambler, 190. See also *Attorney-General v. Sparks*, Ambler, 201.

³ 2 Russ. & M. 717.

⁵ 2 Jac. & W. 294.

⁴ 2 Clark & F. 295.

⁶ 4 Beav. 67.

tees. Lord Langdale there held, that the value of the estate having materially increased, the sums given would increase in proportion, and that those who took the residue would take in the proportion of 4*l.* to every 100*l.*, and were to vary and fluctuate with the other objects of the testator's bounty. For aught I know, that decision might be exactly what your Lordships would have come to. I do not think that because a testator describes the last gift that he makes by the term "surplus," or "residue," it necessarily follows that he means to put the person to whom that is given in a different class from those who take the other gifts that are not so described. It may be that the term "residue," or "surplus," is used only in describing the quantum that the individual is to take, and if there ever was a case in which the will could be fairly interpreted by the use of the word "residue," it was in such a case as that which was before Lord Langdale, because there it was specifically said, "Purchase that which shall yield a net value of 100*l.* a year, and then give 96*l.* a year to

* 26 different charities, and * the residue, being 4*l.* a year, take for yourself." It might well be, that looking at the whole contents of the will, the Court would come to the conclusion that, although it was described as "residue," it only meant that the party should take his share, amounting to 4*l.* a year, just as the other recipients were taking different proportions. All that must depend on the particular language of the will, and without having that will before you, your Lordships cannot feel yourselves fettered or encumbered by that decision.

Then, if I am correct in saying that it is to the particular language and to the circumstances of each will that we must look, in order to see whether the word "surplus," or "residue," is to be taken as indicating surplus or residue, properly so called, or merely as indicating a share of the rent, we may fairly look to the language of this will, and to the circumstances attending it. Upon looking at this will, not only can I find no intention so to use the word, but, on the contrary, there is every indication that that could not have been the meaning of the testator. I put the question to Mr. Rolt in the course of his very able argument, whether he meant that there was to be a variation in the amount of the rent received from year to year, in the proportion of the variation in the 64*l.* 7*s.* 9½*d.*, because, if so, what would be the fraction upon which you must calculate it? It would not do to have it calcu-

lated in a loose and rough manner. It might be very easy to do it in a case where 96*l.* a year are given to certain charities, and 4*l.* a year to a certain person, but here to make such a calculation, you must have a fraction, in which the numerator would be 37,000, and the denominator 46,000 odd.

I do not rely much on that argument, because, independently of it, the case appears to me perfectly clear, although at the same time I must say, that before we can take *The Attorney-General v. The Drapers' Company* as a * case which ought to * 27 govern the one now before your Lordships, we must look to all the circumstances, and one material circumstance is the character of that which is the surplus, and the impossibility that there could be an apportionment made upon the different charges which would work any thing like justice. For these reasons I am of opinion that the very learned Judge here has come to an erroneous conclusion, and that consequently this judgment cannot be sustained.

There are minor points upon which, if a proper case had been made out, if the matter had been free from other objections, possibly an inquiry might have been reasonably asked for. The only interest that those interested in the school at Southmolton can have when it is once decided that the surplus goes to the corporation, is this: they have an interest in seeing that the security for their 40*l.* a year shall not be damaged. The allegation is, that by the mismanagement of the trustees a sum of 20*l.* a year that was payable from a certain parish in London has been irrecoverably lost by lapse of time, and that a field called the Chapel Field, which originally formed part of the leasehold property, has been improperly given up by them to the Church Commissioners, to build a chapel for the benefit of the inhabitants of the town where that land was situated. The information is filed by a person apparently an entire stranger, having no connection with the town of Southmolton, residing in the King's Road, Chelsea; and the information states that the present net income of the charity estates exceeds 800*l.* a year. That being so, it is somewhat unjust on the part of those who have only a charge of 40*l.* a year, to question that which has depreciated the value of this 800*l.* a year, by taking from it a particular field for building a chapel for the convenience of the * inhabitants of the place; but inde- * 28 pendently of that consideration, I think there are grounds

that exclude the present relator from any title to raise such a question in this suit. In the first place, he could not get relief here without having before the Court other parties, because the purchasers have got this ground, and they might raise defences and show that they are entitled to keep this field. For what the defendants say in their answer, and which is entitled to great consideration, is this : it was not a fee simple property of theirs ; the Dean and Chapter of Windsor say, whether you consent or not, when the lease comes to be renewed, it will not be renewed except on the terms of our appropriating this field to the chapel ; therefore all the breach of trust that could have been alleged is, that these parties consented to do by anticipation that which in the course of some years the Dean and Chapter would have compelled them to do, or would have done without them, namely, appropriate a piece of ground for the good of the town for the building of a chapel. It would be a very dangerous course, to allow parties to file an information, raising what would, if well founded, be a substantial and available question, and thus to have a sort of peg to hang something on to relieve themselves from the costs if they should fail, which they will if your Lordships shall concur with me in thinking that they have not established what is the real point in the case. I humbly advise your Lordships that this judgment ought to be reversed, and that the information ought to have been dismissed in the Court below, and dismissed with costs.

LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend. It appears to me that there was a mis-
 * 29 carriage * in the Court below, and that this information ought to have been dismissed with costs instead of the decree having been made which is now brought before your Lordships by appeal.

With regard to the cases upon this subject, there was at one time some little doubt as to one of them ; but now, when by the course of proceeding in the Court of Chancery and also in this Court of Appeal, the law upon which your Lordships are called upon to decide has been clearly established, there can be no longer any doubt about it. It was at one time supposed from the earliest case upon this matter, the *Thetford School Case*,¹ that there was some countenance given to the doctrine, not only that where a

¹ 8 Rep. 130.

fund is given to certain individuals, specifying their proportions, and nothing more is said, that they shall take in the same proportions any increase of that fund which occurs; but that another proposition was deducible from that case, though not actually decided in it, that where a fund or estate is given to certain different objects of charity, such proportions being specified with respect to some of those objects, and none with respect to others, that they all equally take in the same proportions, as well those with respect to whom no specification and no proportion is declared, as those respecting whom proportion and specification have been clearly stated. I do not consider that that can at all be deduced from the *Thetford School Case*; and Lord Eldon, in referring to that case, in the case of *The Attorney-General v. The Mayor of Bristol*,¹ speaking of the supposed inference to be drawn from the *Thetford School Case*, expresses his plain and clear dissent from it, and says that for such a proposition there is no authority whatever. Supposing, however, that that had * been * 30 so in the *Thetford School Case*, it would not go the length of this case, for this case has a most material addition to it; there is not only not a silence, which the alleged inference in the *Thetford School Case* assumes, as to the proportions in which one of the objects of the gift shall take, but there is an express statement of the proportions. The surplus or residue is plainly disposed of in favour of one party and to the exclusion of those who are to take their previous shares in specified proportions. After stating the disbursements and charges, the testator says: "And the overplus which the said Upcott and Northam do produce (which I do find and compute to be about 60*l.* per annum), is to go one half to the mayor, the other half to the repair of the roads between a certain point and the school." Now the only doubt that is raised upon this must be raised upon the words within the parentheses. Yet those words are only a computation; an estimate made by the testator, when he was making his will, of the amount of the disbursements, and the value of his property; he says, my calculation, my estimate is, that taking it altogether, it will be something like 60*l.* a year. It is still more clearly given in the account to which the will refers, where the words are, "Balance which the Corporation of Southmolton will gain per annum"; this is evidently the method which the testator took of summing up all the

¹ 2 Jac. & W. 294.

items in the account, in order to make the two sides of the account square. But I ought not to enter further into this matter, because my noble and learned friend has so distinctly directed your Lordships' attention to it. The testator says, whatever be the balance, I have calculated it at 64*l.* 7*s.* 9½*d.*, but, whether it be more or less, it shall go the one half to the mayor of the town for the time being, the other half towards the repair of the roads. I cannot,

as my noble and learned friend has well observed, fancy
 * 31 * any words more plainly indicating that he was here dealing with the surplus ; but all this is a statement of the testator's estimate, or mere guess, at the time he made his will. So with regard to the next item, "I do desire the corporation, out of their 64*l.* 7*s.* 9½*d.*, to pay for the children's pens, ink, and paper," that is to say, that is my estimate of what it will amount to ; but whatever it may come to, be it more or less, I charge it with the payment of that sum.

I think my noble and learned friend has very justly stated that the case upon which so much reliance was placed in the Court below, and upon which the very able and learned Judge who decided this case appears to have so much dwelt, *The Attorney-General v. The Drapers' Company*,¹ ought not to interrupt your Lordships in coming to a just decision of this case upon that point which alone is now before us, — What was the real meaning and intention of the founder of this charity, the maker of this will ; and what is the meaning of that passage which has been more than once referred to in the account to be found at the foot of this will ?

I have therefore no doubt your Lordships will do right in reversing this judgment, and doing that which ought to have been done in the Court below, namely, dismissing the information, with costs, up to the hearing.

LORD ST. LEONARDS. — I entirely agree with my noble and learned friends that this decree ought to be reversed. The question resolves itself into one upon the will, namely, what was the intention of the testator ?

As regards the law, if the rents of the estate are given,
 * 32 * they represent the estate. If the rents are given in certain proportions, so as to exhaust the whole of the present rents,

¹ 4 Beav. 67.

and if no one is entitled to be benefited more than another beyond that which is specifically given, that is a representation of the estate itself in those proportions; and if the rents increase, each recipient will have his proportion increased accordingly. And on the other hand, as a consequence of that, if the rents decrease, every man's proportion will decrease in the same ratio. No man can take a benefit under that rule who will not be subject to a burthen; and if, therefore, the estate is doled out by a gift of portions of the rents which represent the estate, as the increase will go to the parties in the same proportion, so the decrease must be borne by them in the like proportion.

If there is, as in the second class of cases, a dedication of the estate to a charity, by a clear intention expressed or implied from what is stated in the will, then the whole estate must go to the charity, although the entire rents are not disposed of specifically.

The cases of the third class are a little difficult, and they have sprung mostly, no doubt, out of the *obiter dictum* in the *Thetford School Case*. For instance, take any of those modern cases which have been referred to, in which, in point of fact, there was no gift of the residue, but a gift to a particular body, a college for example, for the benefit of that college, and to certain persons belonging to that college, or to certain poor persons, the objects, *ultra* the college, being confined to particular sums and persons named. In such cases, the question has arisen, what is the meaning of that? it is a gift to the college, and to the particular objects. Suppose, for example, the bursars are to have 10*l.* a year given to them; the rents have increased greatly; are they not to take any increase, in the like proportion, with reference * to the original gift, with the body of the college? After a * 33 considerable struggle with the Courts below, the Court of Appeal has, in every instance, confined the particular objects to the sums specifically given, and left the bulk of the property with the full increase to the body to whom no particular sum was given. So that in all these cases, there being no gift of the residue, as residue, but only a gift of the property to the body, the whole residue has been held to vest, however large it has become, in the college, for example, and without any right to any increase on the part of the particular objects of the bounty of the testator.

I asked the learned counsel who was addressing the House on

the part of the respondent, what would be the consequence, in this case, if there was no gift of the residue? He endeavoured to make out that, in that case, there would be, of course, the same consequence. But the cases clearly establish that if, in this case, there had been no gift of the residue, if there had been perfect silence respecting it, the corporation would have taken the whole of the property, subject to the particular appropriation. That, I apprehend, admits of no doubt. Now, it would be very singular if, in the case I put, of there being no gift of the residue, the corporation would have taken the increased residue, and yet, there being an actual gift of the residue, it should be excluded from any thing beyond the actual residue at the time of the testator's will; for then it would follow that that which was expressed to be given must be considered to have excluded the corporation from that which would have been given to it by implication without any expression.

My Lords, I asked another question, which appears to me to decide this case. I asked whether the respondents contended that if there was a deficiency of the rental, the 40*l.* a year were
 * 34 to be diminished in proportion? and the * learned counsel was necessarily compelled to say, "Yes." I take it to be as clear as any proposition in law, that, according to the authorities, and according to this will, the 40*l.* a year never would have abated a single shilling, while the rents of the estate produced that amount, though the residue might have been nothing. I think that is perfectly clear, both in law, and from the intention of this testator. Then, the party who is to bear the burthen must also take the benefit. The cases have decided that if there is a deficiency, these particular parties are not to bear that deficiency.

I cannot agree that the framing of this devise is not important, as regards the question whether it is a condition or a trust. This is a case in which a particular charge is thrown upon the property, and subject to that charge the property is actually devised to the corporation. Now, if so, and all the beneficial interest has not been disposed of away from the corporation, and no intention is shown upon the face of the will to dedicate the whole to charity, it is quite clear that the corporation would take it, subject only to the particular charges, unless there is some express term upon the face of the will to show an intention that it shall not be so taken.

There has been a little mistake, I think, as regards the form of this will. It is supposed that the testator spoke as if he had given the property to the corporation and to the free school. He spoke of no such thing; he spoke of the property that he had given to each; that is, he has given to the free school certain charges out of the property; he has given the property, subject to those and other charges, to the corporation. Then it is said that these gifts are not to the corporation, but to the mayor individually, and to the highways; and that observation was made in order to take away the force which belongs
* to the actual devise of the property to the corporation, * 35
subject only to these charges. The answer to that is, that the testator has told you, over and over again in this will, that he considers the gift of the residue to be to the corporation. The corporation represents the town; and one half of the expenses of the mayoralty were to be defrayed out of the surplus given by the testator for the benefit of the corporation, thus saving the corporation for the time being half the expenses of the mayoralty, so far as the fund thus provided would go. The expense of the repair of the roads would necessarily fall upon the town, as represented by the corporation. Therefore, at that period, in point of fact, the gifts were gifts to the corporation in the sense in which the testator speaks of them. If you turn to the will, to ascertain from its very words what was the intention of this testator, it seems to me to be perfectly clear, from the language which he uses, that such was his intention. He is speaking of the trustees of the school which he had established; and he directs that they shall pay, out of the revenue of the estate, certain sums for renewals, and so on. They are to take upon themselves the trouble of doing that; and, in respect of doing it, he gives them 20s. a year each. What do you find afterwards? that when he has given the estate to the corporation, the corporation is to pay those sums to the trustees, in order that they may take upon themselves the trouble to do what he has pointed out; and then, after having directed these payments to be made by the trustees of the school, he says: "And for the defraying of this charge, and for the aforesaid intent and purpose, and also to the further uses that are hereinafter expressed, I do give and bequeath unto the Mayor and Aldermen of the borough of Southmolton," on condition that

they shall do certain things. I cannot therefore treat as immaterial the form of this will.

* 36 * I do not at all deny that the words are sufficient to create a trust, and would not be construed as a mere condition to be taken advantage of by nobody but by the heir at law. It is not a strict condition in law, but it amounts to this: "I devise this estate to you, the corporation, for ever, enfeoffing you therewith for your own purposes, subject to the charges that I have imposed upon it, and subject to the provision that I afterwards make." And then he gives certain specific sums, and gives them in such a way that it would be impossible, at any period, under any state of the law, for the corporation ever to resist making those payments in full while the rents were sufficient to answer them, or if the rents fell below them, the corporation must have apportioned them accordingly, and must have made the payments in priority to any thing else. The mayor and aldermen never could have retained a single shilling for themselves whilst any of these payments were unsatisfied. The gift is to the corporation out and out, as a corporation, subject to those particular charges. If, therefore, there had not been a word said about surplus, I should hold it impossible to argue with any hope of success, that the corporation would not have taken the whole property, subject to these charges.

The testator, naturally enough, had a fancy for endeavouring to see how he had disposed of his funds. He puts them down, and then he comes to the fractions which it is necessary for him to set out, in order to enable him to balance his account. But does he show by that an intention, if there should be any increase of the rents, to take from the mayor and aldermen that which he has already given to them? No. He has given to them the whole estate, not on any trust, but upon the particular condition that they shall pay those particular charges. He says that they are to have the surplus or residue after these disbursements.

* 37 * He does not speak of the mayor and corporation as devisees jointly with others. We are told that they are all joint devisees, joint legatees, if you like to call them so. That argument amounts to nothing. The argument is, that the sum of 40*l.* a year, for example, represents a given portion of the estate itself, whatever it may produce. Is that the way in which you use the expression "disbursements"? How does any man treat his own

estate in preparing his will? He puts down on one side his means, and on the other his legacies. This testator thus put down the expenses to which the corporation is liable. Of course payments had to be made, but that is not the language in which a man speaks of charges which he means to represent as a portion of the estate itself.

If you look at the case of *The Attorney-General v. The Drapers' Company*,¹ taking it for granted that that case was properly decided, by doling out the exact amount of rent, you do, in effect, dispose of the whole rent in those particular proportions, whatever the rent may be. And as I before observed, if the amount is to be increased in the one case, so the amount must be decreased, if there should be any occasion for it. Here it is not a question of inclusion, it is a question of exclusion. We are asked to exclude the corporation. What is the ground for that? The testator says that he gives the mayor and corporation, after these disbursements, all the overplus, which he computes at that time to amount to about 60*l.* a year. Can any thing be more clear than that he speaks of that sum, not with the view of preventing them taking whatever may be the amount, but to show what the then benefit was. I do not know how the words are to be got rid of at the end, where he states, "whatever the balance may be, be it * more * 38 or less." Why am I to exclude those words if they are necessary; or, why am I to suppose that those words are ambiguous? We are told that the balance is to be regulated by the amount of charges upon a given sum mentioned. I, of course, understand how this argument is put, but I do not understand the weight of it. We all understand the application of the *Thetford School Case*, and we know how it would operate, but if you come to an uncertain and necessarily fluctuating overplus, given *quid* surplus, the question in the result would come to this: Is this surplus, if necessary to be given at all, given *quid* surplus? Or is it given as so much money, as representing a given portion of the estate, with reference to the other sums? It is perfectly clear that here it was given *quid* surplus. It represented the surplus at that time, and whatever is surplus at one time is surplus in all time; and therefore nothing is taken from the mayor and aldermen by those particular gifts. They already had the surplus. It was necessary to exclude them by some clear expression. So far from

¹ 4 Beav. 67.

being excluded, I am satisfied that no such thing was intended ; every single passage satisfies me that they were intended to be included by the testator. And therefore I very cordially concur with both my noble and learned friends in the conclusion at which they have arrived.

With regard to the costs, I likewise entirely agree. I think that this is one of those cases that ought not to be encouraged. Here is a case in which, for a century and a half, there has been no attempt to disturb an existing arrangement ; yet there has been plenty of opportunity to impeach it. This case was brought before the Charity Commissioners in 1823, and then no question was raised, but every thing was thought right and proper. There was another commission at a much later date, which was intended * 39 to wind up these cases. No complaint was brought * before that commission. This is one of those speculative cases which were at one time a disgrace to the law, and which I did hope were entirely at an end. I am sorry to see an attempt made to revive them. It would have been right enough to have an inquiry if the case had been made out according to the decree below, but that failing, there is no ground whatever, in my opinion, for your Lordships to make any of the inquiries or directions which have been sought for. Still, however, I think that the costs should not be given against this relator beyond the hearing, and for this reason simply, and for no other, that the learned Judge having directed these inquiries, and this relator having proceeded upon that direction, it would be hard upon him to pay for doing what was actually adjudged to be done. I therefore think that there should be no costs subsequent to the hearing, but that there should be costs up to the hearing ; and I do trust that this will be the last case in which an attempt of this kind will be made.

Decree reversed, with a declaration, and remit.

It is afterwards ordered, that the decree of the 25th of July, 1851, be reversed ; that the information filed by her Majesty's Attorney-General, at the relation of James Miles, ought to have been dismissed, with costs up to the hearing of the cause in the Court below ; and that the cause be remitted back to the Court of Chancery, to proceed in the matter as shall be just, and consistent with this declaration and judgment.

Lords' Journals, 2 May, 1854.

1854. May 11, 12.

JOHN WRIGHT HENNIKER WILSON, *Appellant.*
 MARY WRIGHT HENNIKER WILSON, N. WETHER- }
 ELL, and W. C. FOSTER,¹ } *Respondents.*

Husband and Wife. Deed of Separation. Ecclesiastical Court.
Practice. Alteration of Judgment of this House. Costs.

A suit for nullity of marriage had been instituted by the wife against her husband; an arrangement for a deed of separation was proposed, in order to stop it. An agreement was entered into by which the property of the parties was regulated, and by which their conduct in relation to each other was to be guided. One of the articles of this agreement stipulated that the husband should "permit the wife to live separate and apart from him, as if she were unmarried, without any molestation, interference, or annoyance whatsoever by, or on the part of," the husband. By another article, it was declared that if he performed the covenants, &c., "he, his heirs, executors, &c., and their estates and effects, shall be indemnified from all the present debts and liabilities of the said John" (the husband), "by the joint and several covenant of" the trustees for the wife. A deed was to be drawn up in conformity with these articles, and on mutual execution of the deed the suit for nullity was to be withdrawn. On a bill by the wife to compel the husband specifically to perform this agreement, the Vice-Chancellor made an order referring it to the Master to approve of a proper deed to carry its provisions into effect. This order was confirmed on appeal to this House. Pending the appeal, the Master approved of a deed containing a covenant by the husband not to institute any suit in the Ecclesiastical Court for restitution of conjugal rights, and another in which the trustees of the wife agreed to indemnify the husband "against the present and future debts of Mary" the wife. Exceptions to this deed taken by the husband were overruled by the Vice-Chancellor, whose decision was affirmed by the Lord Chancellor:—

Held that, after a previous judgment of this House affirming the order which referred the agreement to the Master as the basis for a deed of separation between these parties, the subsequent order approving of the deed as drawn by the Master must be supported.

But *quære*, Whether as a rule of equity the Court could enforce by injunction a stipulation to live separate, or not to bring a suit for restitution of conjugal rights, though undoubtedly it could enforce stipulations as to an arrangement of property, and as to forbearance from personal molestation?

* *Held* also that the Court was fully at liberty to examine the articles of * 41 agreement, and on finding in them a stipulation as to payment of debts,

¹ *Dolphin v. Robins*, 7 H. L. Cas. 411.

inconsistent with the rest of the articles, and insensible or absurd, to authorise the introduction into the deed of a covenant which would carry into effect the real intentions of the parties.

A decision of this House when once pronounced in a particular case is conclusive in that case, and cannot be reversed except by Act of Parliament; but if the House should afterwards be of opinion that an erroneous principle had been adopted in the first case, the House would not be bound in any other to adhere to such principle.

One part of a decree was held to be sufficiently doubtful to justify an appeal against it; but as to another part of the same decree, the appellant having sought to obtain a construction of articles of agreement, which he knew not to be justified by circumstances, the appeal, being dismissed, was dismissed with costs.

THIS was an appeal against a decree of Lord Chancellor Cottenham, made in July, 1848, by which two orders of the Vice-Chancellor of England, made on the 1st and 2d March, 1847, were confirmed. In 1839, a marriage had been solemnized between the appellant and the female respondent, but serious differences had arisen between them, and Mrs. Wilson had instituted a suit for nullity of marriage. It was desired to put a stop to that suit, and in June, 1843, articles of agreement were drawn up for a separation. N. Wetherell and W. C. Foster were to act as trustees for Mrs. Wilson. The facts of the case and the provisions of the agreement have already been fully stated in the report of a former appeal, when the authority of the Court of Chancery to direct the Master to approve of a deed for carrying the agreement for separation into effect, was the sole question presented to the House.¹ It will only be necessary now to set forth some of the provisions of the agreement. By the first article it was agreed that

* 42 * the said "John W. H. Wilson shall at all times hereafter permit the said Mary W. H. Wilson to live separate and apart from him, at such place and in such manner as she shall think fit, and as if she were unmarried, without any molestation, interference, or annoyance whatsoever, by or on the part of him the said John W. H. Wilson." The sixth provided that all rents, disbursements, &c. relative to the estate where the appellant had resided, should be paid by him, and all charges created thereon by him, up to the time of his surrendering possession of it to his wife, should be satisfied by him up to that time. The seventh declared, "That if and so long as the said John W. H. Wilson shall duly

¹ 1 H. L. Cas. 538.

observe and perform the covenants and agreements herein contained, all the outgoings, in respect of the said several estates respectively, and all expenses of common and ordinary repairs and insurance of or upon the same, and all lessees' covenants in respect of the said leasehold estate respectively, shall from and after the said 24th day of June instant be paid, performed, and satisfied by the said Mary W. H. Wilson during her life. And that he the said John W. H. Wilson, his heirs, executors, and administrators, and his and their estates and effects, shall be indemnified therefrom, and from all the present debts and liabilities of the said John W. H. Wilson, by the joint and several covenant of the said N. Wetherell and W. C. Foster"; provided that if during her life any repairs beyond common and ordinary repairs should be required under lessees' covenants, the amount of such expenses should not be exclusively borne by her, but should be raised by the trustees by mortgage, and provision made for paying off the same. The eighth declared that "if and so long as the said John W. H. Wilson shall duly observe and perform the covenants herein contained, a clear annuity of 1000*l*. charged on Mrs.

Wilson's estates * in Yorkshire, should be paid to him." *43 The ninth article directed "that a proper deed for effectuating the object of these presents, and containing all such covenants, agreements, clauses, and provisions, as shall be deemed expedient for that purpose," should be forthwith executed. And the eleventh and last declared "that upon the execution of these presents by the said John W. H. Wilson the proceedings which have been instituted against him in the Ecclesiastical Court by the said Mary W. H. Wilson shall be suspended, and upon the execution of the deed, to be so prepared as aforesaid, shall be put an end to and withdrawn, but, nevertheless, without prejudice" to Mrs. Wilson's right to institute any other proceedings against him in case he should make default in the performance of any of the covenants, &c. These articles were executed by the appellant on the 2d June, 1843, but delays were interposed by him as to delivering up the house; and in August, 1843, Mrs. Wilson filed a bill to enforce specific performance of the articles, in which bill she stated, among other things, that the word "John" had by a clerical error been introduced into the indemnity clause contained in the seventh article; that the stipulation in that article was to indemnify the appellant against his wife's debts, and not against his

own, and that the deed had been properly drawn according to that intention, with the covenant in the usual form. The appellant put in an answer denying the allegations in the bill, and, among others, denying that there had been any clerical error in drawing out the articles of agreement. The appellant also filed a cross bill, praying that the articles of agreement might be ordered to be delivered up to be cancelled, as obtained from him by intimidation and duress. The respondent put in her answer to this cross bill.

The causes came on together in February, 1845, before the * 44 * Vice-Chancellor of England, who pronounced a decree,¹ referring it to the Master to settle and approve a proper deed for carrying into effect the articles of separation, and the Master was ordered to insert a joint and several covenant by the trustees for Mrs. Wilson, to indemnify the appellant against all her debts and liabilities after the 1st of June, 1843. And it was ordered that an injunction be awarded to restrain the appellant, until the execution of the deed, from taking any proceedings in the suit instituted by Mrs. Wilson in the Ecclesiastical Court, for the purpose of compelling her to proceed in the same, and from obtaining any order to dismiss the same; and other directions were given, which it is not material here to mention. This decree was made the subject of appeal to this House, where, in May, 1848, it was affirmed.² Pending the appeal the Master proceeded under the decree, and in August, 1846, reported that he had settled the draft of a proper deed of conveyance for the purpose of carrying into effect the articles of separation, and had inserted a covenant by Wetherell and Foster, to indemnify the appellant against all debts and liabilities of Mary Wright Henniker Wilson, which existed on the 1st day of June, 1843, and all subsequent and future debts and liabilities of the said Mary Wright Henniker Wilson." The draft deed, however, contained a covenant by Wetherell and Foster, with the appellant, John W. H. Wilson, "at all times thereafter to protect and keep indemnified the said John W. H. Wilson, his heirs, &c., from all the debts and liabilities to which the said John W. H. Wilson was subject or liable on the 2d day of June, 1843." The respondents excepted to the draft deed in that respect. The appellant excepted to the

¹ 14 Sim. 405.

² Ante, 1 H. L. Cas. 538, where the proceedings are fully stated.

report, first, that the deed contained a covenant by the *appellant, "that it should be lawful for the said Mary W. * 45 H. Wilson at all times hereafter to live separate and apart from the said John W. H. Wilson, in such and the same manner in all respects as if she were sole and unmarried, and that he, the said John W. H. Wilson, will not at any time hereafter compel, or endeavour to compel, the said Mary W. H. Wilson to cohabit or live with him by any ecclesiastical censures or proceedings, or otherwise howsoever," &c. Second, "That this passage, if not struck out of the draft, ought to be altered or made to correspond with the terms of the first of the articles of separation." Sixth, "That the draft deed contains a covenant that the said Mary W. H. Wilson shall not hereafter compel, or endeavour to compel, the said John W. H. Wilson to cohabit or live with her," &c. The other exceptions related to the arrangements respecting the property, or were mere matters of form. The exception taken by the respondents was, on hearing before the Vice-Chancellor, in March, 1847, allowed, and those taken by the appellant, with the exception of some as to property arrangements, were disallowed. The orders of the Vice-Chancellor were taken by appeal before Lord Chancellor Cottenham, by whom, in July, 1848, they were affirmed. This appeal was then brought.

The appellant, who appeared in person, apologized for feeling himself compelled to argue his own case. (He was directed to frame his argument on the assumption that the former decree, as affirmed in this House, could not be brought into question. The Master was ordered to approve of a proper deed of conveyance for the purpose of carrying into effect the articles of separation. The first objection was, that the Master had not obeyed this order, but had introduced into the deed a covenant not warranted by those articles. Lord Cottenham described the effect of the judgment * then under consideration, when he said :¹ "It must * 46 be observed that the decree appealed from does not touch the question of separation." In the deed the Master has introduced a covenant, absolutely prohibiting the appellant from suing in the Ecclesiastical Court for restitution of conjugal rights. A Court of equity cannot execute an agreement with a variation introduced by parol, and this variation is not warranted by the articles.

¹ 1 H. L. Cas. 572.

[LORD BROUGHAM. — There is in them a stipulation to allow the wife to live separate and apart, free from all molestation.]

[THE LORD CHANCELLOR. — The deed need not be in the very words of the articles.]

But here it goes beyond the spirit as well as the letter of these articles. The stipulation is merely directed to prevent personal annoyance, but does not even in the most remote manner refer to the appellant's proceeding in the Ecclesiastical Court. If it was intended to effect a compulsory and permanent separation of husband and wife, it is illegal at common law, and the Court of Chancery has no power to enforce it. The Ecclesiastical Court has "exclusive cognizance of such a matter," *Legard v. Johnson*.¹ The judgment of this House assumed that there had been a previous separation, and that the separation did not form any part of the consideration for the deed, and on that assumption the judgment of the House must be taken to have proceeded. Any agreement for the separation of husband and wife is contrary to the policy of the law, and no Court will enforce it. In *Sullivan's Case*,² it is shown that a husband may always in law demand a restitution of conjugal rights. *Whorewood v. Whorewood*,³ * 47 * which occurred in the time of the Commonwealth, does not contradict that proposition. The Court of Chancery, though it may possess the power to enforce performance of articles of separation, will exercise that power very cautiously. It will not interfere to prevent either party from seeking, by lawful means, to put an end to such articles: *Fletcher v. Fletcher*.⁴ In *Head v. Head*,⁵ the Court, though decreeing payment of a sum, under articles, for the past maintenance of the wife during separation, refused to decree it for the future, because the husband was desirous of a restitution of conjugal rights. Lord Hardwicke there rejected the authority of *Whorewood v. Whorewood*, which had been determined during the time of the Commonwealth, when the jurisdiction of the Ecclesiastical Court was abolished. In *Wilkes v. Wilkes*,⁶ it was decided that the Court of Chancery will not establish an agreement between a man and his wife to live separate. *Guth v. Guth*,⁷ and *Rodney v. Chambers*,⁸ which proceeded on an

¹ 3 Ves. 359.

² Macqueen, 634.

³ 1 Ch. Cas. 250.

⁴ 2 Cox, 99.

⁵ 3 Atk. 295, 547.

⁶ 2 Dickens, 791.

⁷ 3 Brown, C. C. 614.

⁸ 2 East, 283.

opposite principle, may now be considered overruled by Lord Eldon in *St. John v. St. John*,¹ and by this House in *Westmeath v. Westmeath*.² It is admitted that Chancery will enforce the deed as to property, *Elworthy v. Bird*,³ but not as to separation, and that, in effect, was the distinction acted on in this House in *Wilson v. Wilson*,⁴ and in Chancery in *Wellesley v. Wellesley*.⁵ *Stephens v. Olive*,⁶ and *Jones v. Waite*,⁷ proceeded on the same principle. In ** Evans v. Evans*,⁸ Sir W. Scott distinctly declares that * 48 the Ecclesiastical Courts look with no favour on separations; and the same opinion had been expressly declared in *Beeby v. Beeby*.⁹ Oughton announces everywhere the same disinclination of the Ecclesiastical Law towards separation. It is impossible, therefore, to suppose that the Court of Chancery would exercise its jurisdiction to enforce that which is alike opposed to the principles of the common law, and to the principles and daily practice of the Ecclesiastical Law.

The only case that can really be said to resemble the present is that of *Ball v. Montgomery*,¹⁰ where, on a suit to enforce payment of money under articles of separation, the Court refused evidence of an intent different from that which appeared on the face of the deed. The conduct of the Master in this case, in introducing a covenant quite unwarranted by the words of the articles, was in contradiction to that authority. The stipulation in the articles not to molest the wife, does not justify the introduction of a covenant not to sue in the Ecclesiastical Court, and no Court will decree its specific performance. In *Westmeath v. Westmeath*,¹¹ specific performance of articles of separation was refused. How is performance to be enforced here? Is it to be done by injunction? The Vice-Chancellor could not have intended it. There is no precedent for such a proceeding; and in *Fletcher v. Fletcher*,¹² Mr. Justice Buller said that he never heard of such a mode of proceeding. *Hill v. Turner*¹³ is no authority for it, for that case has always been denied to be law. In *Warrender v. Warrender*,¹⁴ Lord Brougham * expressly declared, that no specific per- * 49

¹ 11 Ves. 526.

² 1 Dow & C. 519, 5 Bligh, 389.

³ 2 Sim. & S. 372.

⁴ 1 H. L. Cas. 538, 556, 572, 575.

⁵ 10 Sim. 256, 4 Mylne & C. 561.

⁶ 2 Brown, C. C. 90.

⁷ 9 Clark & F. 101.

⁸ 1 Hagg. Consist. 35.

⁹ 1 Hagg. Consist. 143, n.

¹⁰ 2 Ves. Jun. 191.

¹¹ Jacob, 126, 1 Dow & C. 519.

¹² 2 Cox, 107.

¹³ 1 Atk. 515.

¹⁴ 2 Clark & F. 527.

should be a proper deed, with all proper covenants for carrying that into effect, eventually the deed was settled in this form. — [His Lordship here read the covenant, prohibiting the appellant from suing in the Ecclesiastical Court; see ante, p. 44.]

The question now is, whether that is a proper and legitimate mode of carrying out by deed the previous articles of agreement. I do not feel the slightest hesitation in saying that that is a very ordinary mode, and is given as the mode in the books of precedents. What has been argued for by Mr. Wilson is, that he did not stipulate in the articles of agreement that he would not * 52 institute a suit in the Ecclesiastical * Court. He did not certainly so stipulate in terms; but he agreed that it should at all times hereafter be lawful for the wife to live separate and apart from him as if she had been unmarried, without any interference whatever on his part. I believe it was perfectly unnecessary to insert this covenant not to sue in the Ecclesiastical Court, because I believe if he had entered into a covenant in the *ipsisima verba* of the agreement, and an action had been brought on that covenant, and with an averment for breach that he had instituted a suit in the Ecclesiastical Court, it would have been a breach perfectly well assigned. If that is not so, in order to carry into execution the obvious intention of the covenant, it is quite right that the more extended form should be adopted, that that which has been the ordinary form in deeds should be adhered to; and consequently the Master has adopted that form, and I conceive therefore that there is not the slightest ground for complaint as to what has been so done.

With regard to the second objection, the case stands on a different footing. The Master has introduced a covenant that the trustees shall indemnify Mr. Wilson, he performing his part of the agreement, against all present and future debts and liabilities of his wife. Mr. Wilson says, "That is not what I was entitled to; if I am entitled to that, it is only because the parties have agreed now, at the hearing of the cause, to give it me. What I was entitled to was a covenant to indemnify me against all the debts that I owed at the time of entering into those articles"; and there appears to be some foundation at least for his so contending, because undoubtedly in the agreement to indemnify, the debts and liabilities of John W. H. Wilson, and not the debts of Mary W. H. Wilson, are mentioned. It is, however, impos-

sible, on the evidence, not to see exactly how that arose: in truth, it was a mere accident; the name was copied * wrongly. Perhaps Mr. Wilson might be well founded in * 53 saying, "I know nothing of that; that was an error before the matter was submitted to me." So thought the Vice-Chancellor of England; whether rightly or wrongly, I need not discuss now, because, on the hearing of the cause originally, he expressed his opinion that this was not in the sense in which it was expressed by the plaintiffs, a clerical error; that is, I suppose, he meant to say it is not a clerical error as between Mr. Wilson and the other party. His Honour at that time thought that he would not treat this as a clerical error between the parties; but eventually, when the Master had settled the draft, his Honour came to the conclusion that it was an error patent on the face of the instrument itself. I have clearly come to the same conclusion. Whether your Lordships could have seen on the face of the instrument that "Mary" was meant instead of "John," or merely have arrived at the conclusion that it was insensible and had no meaning, it is needless to discuss, because the parties have agreed to other stipulations, which show that the deed must be framed upon the footing that "Mary" shall be substituted there for "John." The only question is, whether, on the true construction of the articles, you can safely come to the conclusion that it was not so intended. I say that, because it is clear that in the way in which the appellant proposes to read the clause, it is insensible. This depends upon the true construction of the 6th and 7th clause of the articles. The 6th clause stipulated — [His Lordship then read it. See ante, p. 42.] This is a distinct stipulation, that, as to these debts and liabilities, whatever they may be in amount, they shall all be paid by Mr. Wilson. That is very intelligible.

Then comes this provision in the 7th clause. — [His Lordship read it. See ante, p. 42.] That is, up to a certain time, he was to pay all these charges, and after that time, * all * 54 outgoing respecting the estate were to be paid by Mrs. Wilson, who was to have the benefit of the estate; and he and his estates were to be indemnified against all and any of these charges. Then come the words, "and from all the present debts and liabilities of the said John Wright Henniker Wilson"; against these he is to be indemnified by the covenant, and then it goes on to provide that, "if at any time during the life of Mary

W. H. Wilson, any expenses shall be incurred in respect of any repairs other than common and ordinary repairs," they are to be provided for by raising the money by mortgage on the property. But Mr. Wilson says, "According to the true construction of the agreement, I am to be indemnified against every thing I owe, or in respect of which I was liable on the day of the execution of these articles," namely, the 1st of June, 1843; because, as he argues, that was a good ground of consideration for the deed. Now, in the first place the observation is — though I do not know that that is a safe ground always to act upon — that it does seem the most extraordinary provision that one ever heard of that, blindfold, the trustees of this lady should covenant to pay all the debts due by the husband, without any account being taken, or any suggestion what was their amount. They were the debts of a gentleman who was in hostility to some extent with his wife, and who was, as he himself admits, very largely indebted, and indebted to an amount the extent of which he states he had no notion of himself, in respect of, amongst other matters, a parliamentary election. It is an extremely improbable thing that the trustees should make such an agreement; the consequence might be that these gentlemen might have involved themselves in irretrievable and hopeless ruin, for the debts might have amounted to 100,000*l.*; as it is,

Mr. Wilson says the debts did, in fact, amount to between * 55 * 12,000*l.* and 13,000*l.* It is a very odd thing that the parties should undertake, collaterally, with no reference to what was to be done for the benefit of the lady, to enter into such an onerous contract as that. Then another thing that is very strange is, that there is no contract in the articles to do that which is very natural under the circumstances, and is the constant course of practice, to indemnify him against the future debts of the wife. The suggestion to explain both these difficulties is, that "John" crept in there instead of "Mary"; that it ought to have been to indemnify him, not against his own debts, but against all the debts and liabilities of his wife; and I think that that is either the necessary inference, or, if not, the whole thing is insensible and irrational, and, consequently, the articles cannot be carried into effect at all; for, observe the repugnancy; there is a positive covenant that he is to pay all the charges, encumbrances, debts, liens, whether legal or equitable, and all expenses of keeping up the establishments, &c., up to the 23d of June inclusive. How could

that be if, nevertheless, in the very next sentence, he is to be indemnified against all that? Such a covenant would be nonsensical and irrational. But, further than that, what is the meaning of saying that he is to be indemnified against all his present debts, so long as he continues to perform the covenants? That, again, is unmeaning. So long as he performs the covenants he shall be indemnified against the accruing debts of his wife; that I understand; but that as long as in future he continues to perform the covenants, he shall be indemnified against his own actual existing personal debts, existing at that moment, has no meaning; because when once those debts have been paid by the trustees, he has nothing to do but to break the covenants, and he may laugh at the stipulation. His covenant was to let the wife live separate; and as soon as * the old debts are paid, if that is the meaning * 56 of it, there is no further performance of the covenant necessary; there is nothing further to be done in his favour, and the whole covenant therefore becomes perfectly unintelligible. But I must say I feel great force in what was pointed out by his Honour the Vice-Chancellor of England on this subject. I do not say we are to look always for accurate grammar in the very loose statements in deeds of this sort, but I do say that the form here used is the most roundabout way of expressing that this gentleman's debts were to be paid by the trustees; for the language runs thus: "From and after the 24th day of June be duly performed and satisfied by the said Mary W. H. Wilson, during her life; and that he, the said John W. H. Wilson, his heirs, executors, and administrators, and his and their estates and effects, shall be indemnified therefrom and from all" his present debts, would be the way that you would word it; but it is: "And from all the present debts and liabilities of the said John Wright Henniker Wilson." That is a very roundabout way of expressing the meaning of "all his debts"; yet that would have been the way the parties would have expressed it, if such had been their meaning.

Then another thing is pointed out by Lord Cottenham, which I think is not unworthy of attention, that this strange provision creeps in as half a dozen words, in the middle of a proviso which has entire reference, both before and after it, to the repair of the estate into possession of which the lady was then to enter.

Taking all these circumstances into consideration, I cannot have the least doubt that one of two results must be arrived at, each of

which is sufficient to sustain the decree ; either that it is apparent on the face of the instrument, that “ Mary ” ought to have been written for “ John,” and then the deed does carry into effect * 57 the true meaning * of the article, or if not, that the whole thing is irrational and insensible, and that the Court could not act on it at all, except for the consent of the lady and her trustees, that it shall be treated as something entitling him to the indemnity he has had secured to him.

I therefore propose to your Lordships that this appeal should be dismissed.

LORD BROUGHAM. — I do not mean to offer the least opposition to the motion of my noble and learned friend, that this appeal should be dismissed, for I think that we can arrive at no other conclusion. But, besides the great regret we naturally feel at seeing a family dispute ripen into a contest in the Courts of law and Courts of equity, and ultimately find its way here, I must add, that I also lament that I had not the fortune to be present when this case was decided on the last occasion in this House, in the year 1848, on the motion of my noble and learned friend, now unhappily no more. I had heard a considerable part of the argument, and I certainly should not have been prepared as then advised, and I will add even as at present advised, to concur in that judgment of affirmance. When I look at the very extraordinary, I may say anomalous, state of our law respecting the important, the most important, relation of husband and wife, whether I regard that law as administered in Courts of equity, or on the other side of Westminster Hall, or in the Ecclesiastical Courts, or even here ; for this House itself, in proceedings to dissolve marriages, has assumed very much of a judicial character (I am now speaking of the past, for I am bound by the decision of your Lordships’ House in 1848) ; but when I look at the state of that law, and recollect the decided cases, *Chambers v. Caulfield*, * 58 *Weedon v. Timbrell*, and *Chamberlain v. Broomfield*, a case not reported, but perhaps the most remarkable of the whole, and which I venture to think would not now be held to be law ; but recollecting those cases, and the case of *Westmeath v. Westmeath*, not to refer to others, I should have found the greatest difficulty in concurring with that decision. Nor would that difficulty have been much lessened, though I had found, as I do find

(and I have not the least doubt that it is so), that the covenant which has been added here to restrain the party from proceeding in the Ecclesiastical Courts is a covenant ordinarily added in such deeds of separation. The addition of that covenant would not in the slightest degree have lessened the repugnance with which I should have felt bound to accede to the judgment of affirmance moved by my late noble and learned friend.

But, my Lords, suppose I had continued irreconcilably adverse to that judgment, we then should have been in this position: that no other result could have been arrived at than was actually arrived at, for that was a judgment of affirmance of the decree in the Court below; and suppose my noble and learned friend and I had irreconcilably differed, the result of that would neither have been more nor less than this: that in the ordinary course of your Lordships' proceedings the decree could not have been altered, and therefore must have stood as affirmed. But the decree has been made; the judgment of your Lordships' House has been pronounced; so that I bow, as I am bound to do, to it, and that without any kind of hesitation. I now cheerfully adopt that decision, which as it stands makes the law, as now it is, upon this important question.

My Lords, that being the case, there is no doubt whatever that the present appeal must be dismissed. It flows from that decree, both upon the first point, namely, the adjection of the covenant to tie up and restrain the party * from proceeding in * 59 the Ecclesiastical Court, and upon the other point of the clerical error. I cannot but feel strongly the argument used by my noble and learned friend as to the frame of that covenant, for, if the party is to be indemnified against all his own debts due by him at that moment, there is no common sense in the arrangement; the condition that precedes clearly is not rational. If and so long as the party shall do so and so, then he shall be indemnified, — against what? Against any new debts, against any interest accruing due and owing on his former debts? No such thing, but against all his debts due *eo instanti*, due at that very day. I do not consider that it is possible to entertain the least doubt on the construction of this agreement.

On the whole, therefore, I agree with my noble and learned friend (that is, because of the former decree of this House) as to the covenant relating to the suit in the Ecclesiastical Court, and

upon the other ground as to the clerical error, that this appeal must be dismissed.

LORD ST. LEONARDS. — My Lords, I am not at all surprised that this case has come a second time by appeal before your Lordships' House; for certainly, though I consider the law perfectly well settled as regards deeds of separation, there were circumstances in this case which might well justify considerable doubt as to what had passed in the Court below and in this House. As regards the point of law, I think there ought to be no doubt, and can be no doubt now entertained, as to how that stands. It is perfectly and clearly settled, and now only to be reversed by Act of Parliament, that deeds of separation may, and must, if they are properly framed, be carried into execution by the Courts of this country. * 60 There is no question at all * about that. There was a sentence quoted by the appellant, from the judgment delivered by Lord Cottenham in this House, that a separation could not be enforced, by which an inference was attempted to be drawn that deeds of separation could not be enforced. That very sentence was cited to the noble Lord on a subsequent occasion in his own Court, and he said that the construction attempted to be put upon it was not the sense in which he used the words, and it is perfectly clear that it was not. I only mention it in consequence of what has fallen from my noble and learned friend who has preceded me, because it must not be doubted that the law of this country is that deeds of separation are valid and will be carried into execution.

Now the objection here is twofold, as I understand it from the appellant; he doubts whether or not the Vice-Chancellor meant to carry it into execution with regard to separation. That is his argument in the first place; and if the Vice-Chancellor did, by the decree, mean that, then he says that the covenant would be carried further than he has contracted for. Now there can be no doubt about what the meaning of the decree was, because the decree goes further than any decree ever did before; and I am by no means prepared to say, that that portion of the decree could have been maintained, if the attention of the House had been directed to it at the time of the former argument. There is an actual injunction on the face of the decree against the appellant proceeding in the cause for nullity, so as to force on what might be ultimately

a decree for the restitution of conjugal rights, until the deed was executed. No doubt that was part of the contract; but the question is this, and a very grave question, whether a Court of equity could or ought to have the power to grant such an injunction. A Court of equity has gone to this extent: a deed of separation we will execute, and you may separate; * and if * 61 there be a consideration for property, which is agreed to be settled upon the separation, we will enforce that; that one understands. The difficulty arising is that which has been alluded to by my noble and learned friend, and which everybody must feel, and which has been argued very well by the appellant at the bar; and I will take this opportunity of saying it was not necessary for him to make any apology, for his case has suffered no loss at all by his arguing it himself; he has argued it exceedingly well, and missed no point; but the difficulty no doubt is this, that it does seem anomalous that if a Court of equity enforces the entering into a covenant, it cannot afterwards enforce the performance of that covenant. For it does not at all follow, because the Court of equity compels the appellant in this case to enter into a covenant that he will not, by the force of ecclesiastical censures, compel restitution of his conjugal rights, that the Court would enjoin him from breaking that covenant which he has entered into; the Court, I apprehend, would leave him to answer any action that might be brought for damages upon the covenant. What amount would be recovered would be another question. But, in point of fact, this decree did contain an injunction against proceeding in the actual suit for nullity in the Ecclesiastical Court, and that decree has, in point of fact, been affirmed by this House, with every thing upon the face of it; and therefore that will introduce, at some subsequent period, a difficulty with which it may be found rather embarrassing to cope. However, we are not now called on to consider the question of entering into the agreement because, upon settled authorities, it is perfectly clear that the agreement would be executed; it is too late to doubt that. It is a settled point of law, that a contract for separation is a valid contract, * and * 62 the agreement to enter into a covenant not to molest the wife, and to allow her to live as a *feme sole*, is a perfectly legal covenant, and would be, and ought to be, as it has been, enforced by the Court.

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nanted that he would allow his wife to live as a *feme sole*, without any molestation or interruption; and that in the deed that stipulation has been converted into one of an entirely different kind. But then I take the point to be perfectly clear, that the short covenant in the contract for separation, which was to be carried into execution by a formal deed, did contain within itself every thing which is contained in the extended covenant introduced into the deed. The appellant cannot imagine that if he had entered into a covenant in precisely the terms of the contract, he could have gone into the Ecclesiastical Court for a restitution of conjugal rights, without breaking that covenant. Would not that be a breach of his covenant, that he would allow her to live as an unmarried woman? Where would the possibility be of defending himself in that suit, there being a covenant that he would allow his wife to live as an unmarried woman without any interruption, if he instituted a suit for the purpose of claiming conjugal rights, and insisted on her being a married woman, and on her coming to reside with him as his wife? It would be a contradiction in terms. Now, my peculiar knowledge of conveyancing enables me to state this, that the covenant that is found on the face of the deed is quite in the common form. I have never seen a covenant in my life in a well-drawn deed (and I have seen as many as most people) in which the covenant for separation did not expressly prohibit the

husband from resorting to the Ecclesiastical Court, in order * 63 to compel the restitution of conjugal rights. * And, therefore, in point of fact, what the appellant agreed to do is exactly what he has been compelled to do, and you find it shortly, and properly, and tersely expressed, as it ought to be expressed, not in extended terms, in the contract to do the thing, and in the deed by which that agreement is to be carried into effect. I am clearly of opinion, therefore, that the appellant has not the slightest ground in reason or law to complain of that part of the decree.

The difficulty that I should have felt, as I have pointed out particularly, is with regard to the injunction that is actually to be found on the face of the decree. But this House has now not the slightest power to touch that question; at all events, not in this cause. It has been doubted by a noble and learned Lord, who is not now present, whether this House can correct any error which it has committed.¹ I confess, my Lords, I have always entertained

¹ *Tommey v. White*, 3 H. L. Cas. 68.

the opinion that in the particular case; you cannot correct the error: it is settled; nothing but an Act of Parliament can reverse it. But I certainly hold, that this House has the same power that every other judicial tribunal has to correct an error (if it has fallen into one), in subsequently applying the law to, other cases.

As regards the second point, the appellant did labour under this difficulty in assuming to be his own counsel. He knew perfectly well, as he stood at that bar, that he had never made any such contract as he was requiring this House to execute. Now, this House, like every other Court of justice, endeavours to execute what the real contract of the parties is; and though it may be compelled by the force of circumstances to execute a contract not such as the parties intended, it must always be with the deepest unwillingness * and regret. The appellant knew per- * 64
fectly well, and could not therefore argue as a counsel in an ordinary case might have done, that he had made no contract for the payment of his debts by the trustees of his wife, or by his wife; and therefore he must have been satisfied, he was satisfied when the thing was pointed out to him, that though the contract was in words to pay his debts instead of the debts of his wife, that that was a simple error, and that if he took advantage of it, it must be upon the mere accidental existence of a particular word, and not upon the real contract, or the intention of the parties. I know what the pleadings are, and I know that the appellant in his answer never ventured to say, because, of course, he would not say what was not true, that there was any contract to pay his debts. Now, could there be a more material term in a contract of this sort, than that when the stipulation was carried into effect, the debts of the husband were to be paid; those debts being unknown, uncalculated, unthought of, and unasked for? The appellant said, no doubt the other side inquired into the amount of his debts. Of whom would they have inquired in the first instance, but of the appellant himself? He well knows of course, as I know, — not that I know any thing out of the case, but from reading and hearing it, — he knows perfectly well what I know, that they never did apply to him to inquire as to the amount of his debts. If they had so applied to him, it would have shown that this was not a clerical error, but was really the agreement of the parties; he says that no doubt they did apply: he

knows perfectly well that no such thing could have entered their thoughts, because they were not aware of the error, if error it was.

I am not at all surprised that there has been a little embarrassment as regards the rule of law and of the Court; I think
 , * 65 there has been as much miscarriage in * this case, if I may say so, as I ever saw, because the point of law was not properly decided upon the first hearing. The appellant is quite right in his argument in the abstract, that a Court of equity cannot execute an agreement with a variation introduced by parol by the plaintiff. It is a perfectly settled point, and the introduction of cases to illustrate it was not necessary at all. It is perfectly clear, that if the answer refuses to admit that there was a mistake in the particular matter, and you do not put a new construction upon it, either the bill must be dismissed, or if the defendant suggests a new view which he is willing to submit to, then the Court has in some cases executed the contract with the variation as admitted or suggested by the answer. There is a list of cases, to which it is unnecessary to refer, in which that has been decided. Now here, the Vice-Chancellor, in the first instance, was of opinion that there was no mistake, and that if the plaintiffs insisted upon the agreement, they must take it as they found it. That I understand to have been his first view. He appears to have changed his opinion afterwards, and the trustees of the wife, having agreed to give a covenant against her debts, present or future, he seems, according to what we see in the decree, to have left in some measure the point open, as it would almost seem, by decreeing a performance of the deed of separation, and then he added that which was not found in the agreement for the deed of separation. The appellant says at the bar, that the Court could execute nothing but the articles for the deed of separation; but the Court did execute something beyond that, and the result has been affirmed in this House, and is therefore binding on your Lordships, because in the articles there was no covenant, according to any construction, to indemnify against the wife's future
 * 66 debts, and, according to the * literal words here, there was no covenant to indemnify against her present debts; and yet, in point of fact, the Court introduced into the deed of separation a covenant to that effect. No doubt there was a great miscarriage in the Court below; the decree ought to have been in a very different form. The decree ought fairly to have met the point on

the true construction of the articles, and it ought to have decided, whether or not "John" meant "Mary," or whether it was to be rejected, or whether the Court could not execute the agreement at all. The Court ought to have decided that, but it did no such thing, but made a decree, which was ultimately affirmed by this House, and which by the noble Lord who moved the affirmance, afterwards sitting in his own Court, was decided to be, by construction of the decree itself, a substitution of the covenant in the deed against the wife's present and future debts, for the covenant in the articles against the debts of the husband.

I confess I think there was a great miscarriage in the Judge's change of opinion, without his coming to a clear result, which he ought to have come to, in order that the litigating parties might know what they had to depend upon. But the question still arises, what is the true construction of the contract? Now it is a great mistake if it is supposed that even a Court of law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a Court of law, as well as a Court of equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes, — without, I say, going into those cases at all, both Courts of law and of equity may correct an obvious mistake on the face of an instrument without the slightest * difficulty. I will give your Lordships * 67 an instance from a case in Douglas.¹ A bond was executed with a condition that the bond was to be void if a party did not pay a sum of money at a given day. The man who had given the bond insisted on a literal performance, just as the appellant does here, who says it is "John" and not "Mary," and I will have my bond, and nothing but my bond. So this man said, The condition is if I do not pay, and I have not paid, and therefore the bond is void. But what did the Court of Law say? That it was an obvious error, and therefore that the "not" was to be rejected, and that the bond was to be void if the man did pay. That, perhaps, was more difficult than the case before your Lordships, because there the Court of Law had to decide that the bond declared to be void if a man did not pay was only to be void in case he did pay. There was no question about going contrary to the intention. It was a question of construction. It struck every-

¹ Anonymous, per Buller, J., in *Bache v. Proctor*, 1 Dougl. 384.

body who looked on it that it was a clear error. Now is not this a clear error? Just see how it stands. In the first place, so important a condition as that the husband's debts should be paid without any account of what they were, or any introduction about it, is wholly unlikely. It would be one of the most prominent and clear features of such a transaction. How would it be carried out? I am not now speaking about calling for a list of debts and having it verified, and the amount stipulated, and a schedule made. Yet who would undertake, without such previous precautions, to pay another man's debts? You are told by the appellant himself at the bar that the debts were not known in amount, which he seems to think in favour of this covenant; but he having

been involved in electioneering expenses, they were, in all
 * 68 probability, very considerable. * What would be the form of the covenant? It would, as my noble and learned friend says, have been a covenant to pay the debts, not to indemnify him. No man living, who knows any thing about the construction of deeds, ever heard of a covenant entered into by a wife and her trustees to indemnify her husband against his own debts. Would it not have been, and must it not have been, if that had been the contract, a clear and distinct covenant to pay the debts? That would have been the undertaking. There might have been nothing incongruous in a covenant to pay the debts, followed up by another, declaring that the husband should in the mean time be indemnified against them; but no man ever heard of a man being indemnified against his own debts. What he wants is payment, and nobody finds that on the face of this deed.

What, then, is the plain construction of this instrument? I am clearly of opinion that, upon the proper construction of these articles, without doing the slightest violence to words, this is a covenant to indemnify the husband against the wife's debts, and not a covenant to indemnify him against his own debts; and that your Lordships could not have come, and would not have been entitled to come, to any other construction, and to that you could come without parol evidence, and upon the mere frame of the deed read in a sensible way, so as to see what the meaning of the parties is. I have shown that at law the introduction of words operating to destroy the whole instrument may be rejected, and so here you may reject these words, and may read it as really it is intended to be. Observe the absurdity of the argument about the

intention, as expressed in this deed, to pay the debts. The 6th clause provides that the husband shall pay all the taxes, and so on, and the expenses of the establishment up to a given day, when he was to leave the house; and then *the wife herself * 69 was to go into her own original house, after which she was to pay all expenses. He had had possession of the wife's estates, and he was thenceforth not to have it, but to have 1000*l*. a year out of the wife's property. It was anticipated that he might have charged those estates, and he was to pay the debts as far as he had incurred them, because they were his debts, though his wife had had the benefit of them, up to the time when the wife was to re-enter on her own house. What is the meaning of a covenant to indemnify against his debts? What debts would the wife be liable to, or be likely to be liable to, if he were to be indemnified from the debts, but those very debts which the covenant provides that he himself shall pay? She had been living some time apart from him, and these debts were incurred at some period during that time. Those were legal debts of his; but those were precisely the debts which, if he was to be indemnified against his own debts, would be in effect her debts, although not legally; he, of course, would have claimed to be indemnified against them beyond all others. Then, suppose he had got 10,000*l*. on his interest in the estates while they were in his possession; those were precisely the debts which she must have paid. She must have taken the property again subject to the charges which he had made, if there had been any intention that his debts should be paid by her or by her trustees. But those debts were expressly provided for to be paid by himself, and she is to be indemnified against them. All these things are consistent with one another: they all follow each other properly. The other construction which is contended for by the appellant is irrational and absurd, and we know it not to have been the contract. If there had been any such intention, would it not have been, "all his debts save and except such debts as he has hereinbefore covenanted *to pay," namely, the housekeeping expenses, rates and * 70 taxes, up to the 24th, and such debts as he had charged upon the estates? I should have said, if such had been the agreement, that if there were any debts against which he ought to have been indemnified, they would have been, above all others, those that he had charged on her estates while he believed himself,

and was really, the owner of them ; but specifically he is bound to pay these ; and therefore his contention on this point is against what we know to be the contract.

Then has the Court a power to rectify the error without doing any violence to the words ? because I entirely reject any intention of putting violence upon words. We are bound as a Court of justice to put a rational construction upon words, and to give to every word its proper sense. I do not think that I am breaking in upon any rule in advising your Lordships to consider " John " as erroneously inserted, as it clearly appears by the context to have been, instead of " Mary," and by so considering it to make that part compatible with the rest, and thus give effect to what was the clear intention of the parties. The great object of all Courts of justice, while, of course, they abstain from breaking in upon any rule of law, is to see that justice is done between the parties in the execution of contracts according to their real meaning. It has always been a matter to be deplored if, on account of any exact rule of law, you are compelled to execute a contract contrary to what you know to be the meaning of the parties ; and if you had been compelled in this case to put the construction upon the contract for which the appellant has contended, you would have saddled this lady and her trustees with an indefinite amount of debt, not one single shilling of which was ever stipulated to be paid by her or them, and not one shilling of

*71 which they ever intended to * enter into a contract to pay ; and you would have been compelled to execute a contract, onerous indeed on one party, and to which the other party was in no respect entitled.

Without therefore at all approving of the original decree, or the manner in which it was drawn up, or even what formerly took place in this House upon it, for I cannot say, taking all things together, that I think that the clause as to the injunction was properly adverted to, I entirely agree in submitting to your Lordships that this decree should be affirmed.

The only further question is as to the costs. The difficulty about the costs is this. I think, that there was so much difficulty upon the form of the decree, and the opinions entertained, that there might have been a sufficient justification for the appellant coming here upon that matter. But the appellant has come here to insist upon what is not an honest and fair construction of the

contract. He has endeavoured to fix on the parties to this appeal a construction of the contract which he was perfectly aware was not justified by the circumstances. I think therefore, on the whole, that the safest conclusion to which we can come is not only to dismiss this appeal, but to dismiss it with costs.

LORD BROUGHAM. — My Lords, I agree entirely with what my noble and learned friend has said as to the impossibility of any thing but an Act of Parliament altering any judgment of this House that has once been pronounced in a cause. It is a totally different thing, and is a *questio vexata*, how far we may or may not disregard any one of our own judgments, when applied to another cause. When I alluded to the injunction against the proceedings in the Ecclesiastical * Court it was with this view, *72 which my noble and learned friend has generally referred to, namely, as leading to a conflict of jurisdictions; because whereas the Ecclesiastical Court will not in the slightest degree regard a covenant into which a party has entered not to sue there, the Court of Chancery is called on by injunction to restrain him from taking such a proceeding. As to damages on such a covenant, that is a totally different question; and I hope it will not go out that any opinion has been given either way as to how far damages may be recovered at law by trustees in a case of this sort for breach of a covenant not to sue in the Ecclesiastical Court.

Orders affirmed, with costs.

Lords' Journals, 12 May, 1854.

RANGER v. THE GREAT WESTERN RAILWAY COMPANY.

1854. May 31; June 3, 6, 7, 9, 10, 13, 14, 16, 17.

WILLIAM RANGER, *Appellant*.

THE GREAT WESTERN RAILWAY COMPANY and others, *Respondents*.

Corporation. Fraud. Interest of Judge. Penalties. Liquidated Damages.

A corporation of itself cannot be guilty of fraud, but where it can only accomplish the object for which it was formed, through the agency of individuals,

... fraudulently, the corporation stands in the same situation with respect to the conduct of its agents as a private person would have stood had his agent conducted himself.¹

A contract between a railway company and a building contractor, stipulated that payments should from time to time, during the progress of the works, be made by the company to the contractor, such payments to be made on certificates granted by the "principal engineer of the company or his assistant resident engineer." In case of dispute between the contractor and the assistant resident engineer the decision of "the principal engineer of the company" was to be final; but at the completion of the works, if the contractor and the principal engineer differed, the differences between them were to be settled by arbitration. After differences had so arisen between the contractor and the company, it was discovered by the former that the principal engineer was a shareholder in the company. On a bill to have accounts taken, one of the grounds for which was this fact, then first discovered :

Held, that (no fraudulent concealment being alleged) it formed no ground for relief; for that by contract the contractor had bound himself to submit to the judgment of a particular individual, whose position as principal engineer made him interested for the company. The case of *Dimes v. The Grand Junction Canal Company* (3 H. L. Cas. 759) held not to apply.

A contractor undertook to do certain works within a given term, or to pay certain fixed sums; whether these were penalties or unliquidated damages was not necessarily the subject of a bill in equity, but might properly have been decided in an action at law. The fact that a bond with a penalty had been given to secure the payment of them was itself strong evidence to show that they were liquidated damages.

A contractor agreed with an incorporated company to do certain works, the contract being under seal. In this contract there was a stipulation, that if the company should think proper at any time to make any addition to the original works, the company should be at liberty to do so on giving him written instructions for that purpose, signed by the principal or assistant engineer. A verbal arrangement was afterwards made by the principal engineer for the execution of certain extension works allowing for a variance in the prices, but stipulating that with the exception of that variance, all the provisions of the contract should be considered as applicable to the extension work. This work was executed by the contractor under this arrangement : —

Held that he could not afterwards reject the terms of the contract, and claim remuneration for the work as upon a *quantum meruit*, nor could he ask in equity for accounts to be taken independently of the contract.

In a contract with a railway company for the execution of certain works, there was a clause empowering the company, after notice, to take possession of the plant and to finish the work: the company acted on this clause : —

Held that this did not furnish ground for a bill in equity as putting an end to the contract, though it might be the subject of an action for damages.

¹ *New Brunswick & Canada Railway Co. v. Conybeare*, 9 H. L. Cas. 722; *Western Bank of Scotland v. Addie*, Law Rep. 1 H. L. Sc. 145.

*AFTER the passing of the Acts for making the Great *74 Western Railway from London to Bristol, the appellant entered into contracts with the directors of the company for executing certain parts of the work. The first contracts related to the Bristol end of the line, and were called the 1 B and the 2 B contract, and adjoining to these was afterwards added another work, called the 1 B extension. The second contract was designated 8 L, and related to a portion of the London division of the line near Reading. The appellant entered into an agreement¹ by which he undertook to "complete all the fences, drains, earth-work, and tunnels, and the Avon Bridge, and all the works included in this contract, exclusive of the extra works, according to the plans and specifications exhibited to me, and within the period, and upon the terms and conditions mentioned therein, for the sum of 63,028*l.* 10*s.* 0*d.* And I hereby further undertake to execute such other of the works, described in the specifications as extra works, as may be required, within the period, and upon the terms and conditions specified, at the prices set forth in the annexed schedule, and at which prices, also, any allowance for additions to or diminutions of the work referred to in the first part of this tender is to be calculated." A formal contract, dated on the 19th March, 1836, was afterwards executed between the directors of the company (acting as a corporate body) and the appellant. This contract described how the work was to be executed, and provided that, if not commenced or proceeded with to the satisfaction of the company, it should be lawful for the company to give notice requiring the appellant "to enter upon and commence, and regularly proceed with the said works; and in case he shall, for seven days after such notice given, make default in *commencing or regu- *75 larly proceeding with the said works," the company might employ any other respectable workman by contract, or measure and value, and pay him out of the money remaining due to the appellant. That in case the principal engineer for the time being, or his assistant resident engineer, should disapprove of the materials brought on the ground, the appellant should be obliged to remove them and to substitute others. That all such works as were in the specification referred to, or described as extra work, which the principal or assistant resident engineer should in writing require

¹ In all the parts of the contract where the exact words are material to the decision they are given between inverted commas.

to be executed, should be considered as included in the covenants in that contract, and should be executed according to its intent "within such reasonable period or periods as the principal engineer for the time being, or his assistant resident engineer, shall appoint." If the company should think fit to make any alterations, additions, or omissions, they might be made on notice given to the appellant, signed by the principal engineer, or his resident assistant engineer, and "the period for finishing or completing all such additional or altered works shall be fixed by the principal engineer, or his assistant resident engineer," and no such alteration, &c. should violate the contract. "In the event of any dispute arising between the appellant and the resident engineer, inspector, or surveyor for the time being, concerning any of the matters aforesaid, the appellant shall and will abide by, observe, perform, fulfil, and keep, and in all things obey, the decision in writing of the principal engineer for the time being." Provided that if the appellant should be prevented, or materially impeded, or delayed in proceeding with or completing the works in consequence of any acts done or omitted to be done by the company, or any authorised engineer or agent, such delay should not affect the contract. Except that in such case the principal engineer should determine whether any

* 76 and what extension of time * should be allowed, and whether any and what compensation should be allowed to the appellant. "That the company will pay 63,028*l.* 16*s.* 0*d.* for the completion of the said earth-works, tunnels, permanent fences, drains, bridge, masonry, and other works (exclusive of extra work)." The payments were to begin at the end of 14 days after the commencement of the work, and to be made on "four fifths of the whole value of the said works which shall have been then executed, such value to be estimated by the principal engineer, or his assistant resident engineer, having reference as well to the prices set forth in the schedule to the tender as to the entire cost of the whole works, the execution of such works to be certified by the principal engineer, as hereinafter mentioned, and so from time to time at the expiration of every succeeding 14 days, &c." The payments were to go on thus, until the one fifth retained should amount to the sum of 4000*l.*, and within one month after completion, the company was to pay 2000*l.*, and at the expiration of the year pay the remaining 2000*l.*, with interest thereon at 4 per cent. The extra works to be paid for according to the schedule in the tender, certified, &c., as be-

fore, by the principal engineer, and subject to the same deductions. The appellant was not to be entitled to demand payment for works completed until they were certified by the principal engineer or his assistant resident engineer, as being executed to satisfaction, &c. The principal or assistant resident was, "on notice," to examine the same without delay. "During the progress and until completion of the works hereby contracted to be done and executed, the decision of the principal engineer for the time being of the said company, with respect to the amount, state, and condition of the work actually executed, and also in respect to any and every question that may arise concerning the construction of the present contract, or the aforesaid drawings, tender, * or specification, or the general or particular description of works therein contained, or the nature of materials, or the execution of the works hereby contracted for, or any other matter or thing whatsoever relating to the same, shall be final, and without appeal. But if any difference of opinion shall arise between the company, or the engineer, and the said W. Ranger, such dispute shall be referred to, and finally settled and concluded by the arbitration of the said engineer on the part of the company, and an engineer appointed by the said W. Ranger on his part; and in case of their not being able to agree, a third person shall be named as arbitrator by such two engineers, the decision of any arbitrator so named being final and binding on both parties."

To this contract a schedule was added. In it the centre line and the boundary line of the railway, as shown upon a plan ("believed to be correct"), were referred to. "The principal quantities of the materials required to form the embankment No. 1, and the stone for the construction of the Avon Bridge, and other masonry, must be obtained from the tunnels and cuttings to the eastward of the tunnel No. 1." As soon as the heading through the first tunnel was completed, "and good materials for building the foundations and lower work of the Avon Bridge have been obtained, the bridge must be commenced"; and, "as the works proceed along the line, a greater choice of stone will be obtained, from which the engineer will select as he may conceive best adapted for the upper works of the said bridge, and other masonry." In the "description of the works included in the contract" the making of a retaining wall was stated to be part of the

extra work, and was particularly specified ; the tunnel, in cross section No. 1, drawing 9, was mentioned, and it was said " the sides of the tunnel, which are supposed to be in sandstone, * 78 * must be neatly trimmed and dressed ; any hollow, formed of careless working, must be filled up with rubble masonry, well bonded into the natural rock." Shafts were to be sunk, and the walling them round, to secure them, with masonry, was provided for. The time for commencing and completing the contract was fixed, penalties for non-performance within the time agreed to, and the contractor, if he finished the whole work within the stipulated time, was to be allowed 150*l.* a week, for each week, till that time should have run out. Among the " general stipulations " were the following : " The contractor must satisfy himself of the nature of the soil, of the general form of the surface of the ground, of the quantity of materials required for forming the embankment, and all matters which can in any way influence his contract ; and no information upon any such matters, derived from the drawings or specification, or from the engineer, or his assistants, will in any way relieve the contractor from all risks, or from fulfilling all the terms of this his contract." " If at any time the company shall find it necessary to take the work entirely, or in part, out of the hands of the contractor, or put on additional workmen, or to supply additional materials to expedite the work, or to enforce its proper execution, the company shall have full power to take possession of the whole or such parts of the materials, tools, or implements, used by the contractor, which the company's engineer may consider requisite for carrying on the work." The arrangement for the 1 B extension was made by parol, between the principal engineer and the appellant, on the understanding that it was to be subject to the stipulations of the previous contracts. The contract 8 L was substantially the same as the others.

Disputes arose between the appellant and the company ;
 * 79 * the appellant was pressed for money, and executed a mortgage of the works to the company and certain other persons, in respect of money advanced to him by the company, although, as he contended, he ought to have received that money as payment for work done, had the certificates been granted in due time, and for proper sums. The appellant continued, however, to go on with the works ; but, finally, the respondents gave the required

notices, and took possession of the works under the stipulations in the contracts, and finished the works.

In July, 1838, the appellant filed his bill against the company and others, and then a supplemental bill, and a second supplemental bill.¹ He charged that, by the fraud of the directors, he had been deceived as to the nature of the soil he should have to cut into or through; that he was induced to believe it was sandstone, whereas, in truth, it was dun stone, or pennant, or hanham stone, all being much harder, and more difficult to work than sandstone; that the certificates for his work, as it proceeded, had not been duly allowed; that he had been delayed, by the acts of the respondents, in the execution of his work, and that masonry work of a very expensive description had been calculated as ordinary work.

The respondents put in their answers to these several bills, and the cause came on before the Vice-Chancellor of England, who, by a decree, dated 13 July, 1844,² declared that the 1 B extension must be considered as included in the 1 B contract, and it was referred to the Master to take an account according to the contracts, having regard to the sums advanced on mortgage or otherwise, by the respondents, and the Master was to inquire as to the sort of work done, and whether there was any * thing * 80 due to the appellant for underpayment, and what there was due from him for non-performance of the work within the specified time; and after certain usual directions, it was, except as to the accounts and inquiries thereby directed, ordered that the appellant's bill should be dismissed with costs.

The appellant appealed against this decree, as granting him insufficient relief, and the respondents presented a cross appeal, on the ground that the Vice-Chancellor ought to have dismissed the bills with costs. The appeals were heard by Lord Chancellor Cottenham in 1847, but no judgment was pronounced. They now come on again for argument.

Sir F. Kelly and *Mr. Twells* for the appellants. — The decree in the Court below was wrong in treating the contracts as still existing, and as forming the standard by which the accounts were

¹ On the question of the practice of filing supplemental bills, see this case in 13 Sim. 368.

² 1 Railway Cases, 1, 3 Railway Cases, 293.

to be calculated. The contracts were at an end. As to the 8 L contract, it related to a line altogether different from that on which the work was actually performed. As to the B contracts, there was deception practised with regard to the soil in which the works were to be performed. Trial pits existed, but they did not fairly show the nature of the soil, and the appellant himself had no means of ascertaining whether the produce taken from these pits truly represented the soil, or had been dug deep enough for that purpose, since the pits were partly filled with water when he saw them. The contract price for the work had been stipulated for on the ground that the soil was sandstone. In truth, it was composed of a much harder material, known as hanham stone, and the appellant was entitled to be paid, not according to the prices stated in the contract thus fraudulently obtained from him, but according to the real value of the labour he had performed.

* 81 * The performance of the contracts within the stipulated time was rendered impossible here by the alterations and substitutions introduced by the engineer into the original work, by neglect to fix the time for performing it and delay in giving him possession of the land. No penalties, therefore, can be enforced against the appellant, for the default did not originate with him, *Holme v. Guppy*.¹ Besides, the certificates not being duly given, and the money due for work actually performed not being paid in due time, the appellant was thereby disabled from proceeding as he would otherwise have done. All these things were conditions precedent, *Dallman v. King*;² and the delay being, in these respects, occasioned by the respondents themselves, they cannot set up any claim for penalties. The decree, though recognising the fact that these payments were not punctually made, has yet treated the appellant as liable to penalties. In that respect it cannot be sustained.

The works of 1 B extension ought not to have been treated as executed under the written contract. The respondents did not enter into any contract as to them. A corporation can only contract under seal, *Mayor of Ludlow v. Charlton*.³ But still the work done was done under the direction of the respondent's authorised agents, and has been adopted by the respondent, and

¹ 8 M. & W. 387.

² 6 M. & W. 815.

³ 4 Bing. N. C. 105, 5 Scott, 382.

for such work an action may be maintained, though no contract has been formally made, *Clarke v. Imperial Gas Light Company*; ¹ *Beverley v. The Lincoln Gas Light Company*; ² *Clarke v. The Guardians of the Cuckfield Union*, ³ where all the previous cases were reviewed. The directors here gave authority to the engineer, and * the work having been executed by the appellant, and having been adopted by the directors, it forms a proper item in the accounts to be taken by the Master; but its value must not be calculated under the contract. * 82

It is clear that the stipulation respecting the decision of Mr. Brunel being final cannot be enforced. He was a shareholder in the company; he was, therefore, interested in it. He was thereby disabled from being a judge in any matter in which the company had an interest. His decision was invalid, though there was not proof that he had acted partially: *The Queen v. The Cheltenham Commissioners*; ⁴ *Dimes v. Proprietors of the Grand Junction Canal*.⁵ The fact that Mr. Brunel was an interested party was known to the respondents, but was unknown to the appellant. The non-communication of that fact to the appellant was a fraud upon him, and vitiates the stipulation as to his submitting to the final decision of such an interested arbitrator, improperly imposed on him as an impartial judge.

The Solicitor-General (Sir R. Bethell) and Mr. Stevens for the respondents. — The bills ought to have been dismissed. In granting any part of their prayer the decree was wrong. The whole of the relief sought by these bills really depends on the right of the appellant to strike out certain portions of the contract, on the ground that he had, by fraud, been induced to enter into them. If he cannot establish the alleged fraud his claim to relief is gone. In truth he seeks to set aside part of the contract, but to have his remedy on the other part of the same contract. That cannot be done. In *Myddleton v. Lord Kenyon*,⁶ which is the only case that resembles the present, a bill was filed for the purpose of * setting aside a family agreement, which was made be- * 83

¹ 4 B. & Ad. 315.

² 6 A. & E. 829.

³ 21 Law J., N. S., Q. B., 349. See also *Lowe v. London and Northwestern Railway Company*, Id. 361.

⁴ 1 Q. B. 467.

⁵ 2 Ves. Jun. 391.

⁶ 3 H. L. Cas. 759.

tween a father and son ; it was sought to annul part of that agreement on the ground of an alleged fraud. Lord Rosslyn held that a deed could not be set aside partially for fraud ; and in *Glascott v. Lang*¹ Lord Cottenham decreed, that where a bill made a case of fraud, and, at the hearing, the fraud was not established, the Court would not allow the bill to be used for a secondary or subordinate purpose, but would dismiss it, the principle of equity being, that if you ask for relief against the contract on the ground of fraud, you cannot, at the same time, ask for relief under the contract. But the pretence of fraud here is an after-thought ; for the prayer of the original bill was, that the respondents might be decreed to elect whether they would permit the appellant to complete the work or to discharge him from the further performance thereof. The three bills contradict each other in their statements and in their prayer. The third supplemental bill ought at all events to be dismissed, *Milligan v. Mitchell*.² The decree here is wrong, because, reciting that the relief asked is only on the footing of the contract, it yet gives relief independent of the contract. The company did not break the contract by taking possession, and, therefore, the appellant has no right to ask for an account on the footing of measure and value. There is no part of the decree not appealed against which can be made to harmonize with the prayer of the bill.

As to the trial pits, there is no averment that they were made for the purpose of deceiving ; that is left to be inferred, but that is not sufficient. The evidence shows that they were sunk for quite another purpose, and the schedule expressly requires the contractor to examine for himself, * and declares that he is not to rely on information obtained from the company's agents. Besides which, the schedule called his attention to the fact that the soil was of the hardest kind of sandstone, for it provides for the making of the Avon Bridge, and other masonry, from the materials to be got out of the cuttings and the excavations. So that there is no pretence for the charge of fraud.

The next alleged ground of fraud is, that the principal engineer who was to decide on any questions in dispute, during the progress of the work, was, without the knowledge of the appellant, a party interested as a shareholder in the company. That is no ground

¹ 2 Phillips, 310. See *Curson v. Belworthy*, 3 H. L. Cas. 742.

² 1 Mylne & C. 433. But see *Walford v. Pemberton*, 13 Sim. 441.

for impeaching the contract. The cases of clauses for appointing arbitrators have nothing to do with the present. Whatever power was exercised by Brunel, was so exercised in virtue of a specific stipulation in a contract. The principal engineer of the company was expressly designated, and Mr. Brunel was named as the person holding that office. If there was any desire to keep him free from any interest as a shareholder, the inquiry ought to have been made, for every one must have supposed that the principal engineer of such a company would have some shares in it.

[THE LORD CHANCELLOR. — If Brunel was disqualified because he was a shareholder, it would follow that the company could not appoint a shareholder to be the principal engineer. LORD BROUGHAM. — At least not without due notice to the contractor.]

But beyond this, it is plain that his interest as engineer would far exceed that of his interest as a shareholder, and he was emphatically described as “principal engineer”; so that the fact of his being interested was actually declared on the face of the instrument, and he was accepted as the judge during the progress of the works, being known at the time to bear that particular character.

* *Sir F. Kelly* replied. — The respondents here, after receiving great benefit from the works of the appellant, no part of which has ever been pretended to be badly executed, seek, by possessing themselves of the works and completing them, to relieve themselves from the liability to account and pay for that which he has done. The complaints as to delay cannot be supported; they were occasioned by the acts of the respondents or their engineer. The appellant was thus put under circumstances of difficulty, and those who occasioned the difficulty are alone responsible for the delay it created; *Holme v. Guppy*¹ is precisely in point. The fact that Brunel was a shareholder was unknown to the appellant at the time he entered into the contract, and he never received notice of that fact; Brunel is, therefore, disqualified to act as a judge between the appellant and the respondents, and the latter cannot justify any thing they have done as done by and under Brunel’s advice or direction. The respondents were bound to give the

¹ 8 M. & W. 387.

appellant every facility to know the real state of the soil he had to work in, and though the pits might not have been made on purpose to deceive, if they did deceive the appellant, the result is the same. A legal, though not a moral, fraud has been committed, and the respondents cannot take advantage of it. *Dobell v. Stevens*¹ lays down the true rule on this point. This is not a bill exclusively charging fraud, but claiming that accounts shall be properly taken; and in respect of one or two parts of the transaction, fraud is charged as a reason why the appellant should not be bound by the literal contract, but should be allowed to enter into the accounts; *Myddleton v. Lord Kenyon*² is therefore in-
 * 86 applicable. The engineer * had the power to order alterations; it was expressly his duty to fix the time within which they should be done. He did not perform that duty, and the appellant was not bound to ask him to perform it, nor can the appellant be now held liable for the consequences.

THE LORD CHANCELLOR having stated the substance of the bills and answer, and the two appeals, said: Before I proceed to call your Lordships' attention to the grounds on which the appellant rests his title to relief, and to consider how far that title is well founded, it is necessary shortly to advert to the terms of the contracts, which are all nearly alike. — [His Lordship first stated the 1 B and 2 B contracts.]

The first ground on which the appellant rests his title to relief is, that he was induced to enter into the contract 1 B by the fraud of the company; that the time within which he agreed to do the works was far less than what he would have required if he had known the real nature of the soil through which the tunnels were to be made; but that on this point he had been misled by the fraudulent contrivance of the respondents.

The question on this part of the case is one of fact: Is it established that any imposition was practised on the appellant to induce him to enter into the contract? for if there was, he is clearly entitled to relief, though whether precisely that which he asks for, is another question. Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished

¹ 3 B. & C. 623.² 2 Ves. Jun. 391.

through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting * for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation.

The question, therefore, on this part of the case is, whether the directors, or the engineers, or agents, whom they employed, were guilty of the fraudulent misrepresentations alleged by the bill. I am clearly of opinion that no such case is made out. — [His Lordship here very minutely examined the evidence on this point.]

I cannot attribute to the respondents the fraudulent intention imputed to them, an intention as absurd as it would have been fraudulent, of meaning to mislead those who should apply to make tenders for the work, when they must have felt that the success of such a fraud was entirely dependent upon the very improbable chance that those who should be attracted by the notices would omit to make inquiry into the nature of the soil they would have to excavate. The work was not one of a trifling nature. One of the persons who made a tender demanded above 100,000*l.* — [His Lordship here again examined the evidence as to the different sorts of stone.]

To all these considerations must be added, that the appellant did not, so far as there is any evidence on the subject, make any remonstrance as to this supposed deception or mistake during the progress of the works, nor until after the relation between the parties had been entirely determined. On these grounds, I have come, without hesitation, to the conclusion that the appellant has failed to establish any title to relief on this head of fraud.

The next ground on which he rests his title to relief is, that Mr. Brunel, the principal engineer of the company, on whose decision many matters were, by the terms of the contract, made to depend, was incapacitated from acting * in the discharge of the * 88 duties imposed on him, by reason of his being himself a shareholder in the company. — [His Lordship here read that part of the contract.]

It is not necessary to state the duties of the engineer in detail: he was, in truth, made the absolute judge, during the progress of the works, of the mode in which the appellant was discharging his duties; he was to decide how much of the contract price of

63,028*l.* from time to time had become payable, and how much was due for extra works; and from his decision, so far, there was no appeal. After all the works should have been completed, the appellant might call in a referee of his own as to any question as to the amount (if any) then due beyond what had been certified.

The contention now made by the appellant is, that the duties thus confided to the principal engineer were of a judicial nature; that Mr. Brunel was the principal engineer by whom these duties were to be performed, and that he was himself a shareholder in the company; that he was thus made a judge, or arbitrator, in what was, in effect, his own cause. That until the month of July, 1838, the appellant was unaware of the fact of Mr. Brunel having any interest in the company, except as the engineer, and so ought not to be bound by any of his decisions.

This branch of the appellant's argument rests on the principle decided in this House, in the case of *Dimes v. Proprietors of the Grand Junction Canal*,¹ in which your Lordship agreed with the able opinion delivered by the learned Judges, through Mr. Baron Parke, that the decision of a judge made in a cause in which he has an interest, is voidable, unless in cases of necessity, as where an action was brought against all the Judges of the Court of Com-

mon Pleas, on a matter on which they had exclusive jurisdiction. * 89 But the question is whether it governs the present case. I think the principle has no application here; a judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other. In ordinary cases it is a just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent. But here the whole tenor of the contract shows it was never intended that the engineer should be indifferent between the parties.

When it is stipulated that certain questions shall be decided by the engineer appointed by the company, this is, in fact, a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The company reserved the decision to itself, acting however, as from the nature of things it must act, by an agent, and that agent

¹ 3 H. L. Cas. 759.

was, for this purpose, the engineer. His decisions were, in fact, those of the company. The contract did not hold out, or pretend to hold out, to the appellant, that he was to look to the engineer in any other character than as the impersonation of the company : in fact, the contract treats his acts and the acts of the company, for many purposes, as equivalent, or rather identical. I am therefore of opinion that the principle on which the doctrine as to a judge rests, wholly fails in its application to this case. The company's engineer was not intended to be an impartial judge, but the organ of one of the contracting parties. The respondents stipulated that their engineer for the time being, whoever he might be, should be the person to decide disputes pending the progress of the works, and the appellant, by assenting to that stipulation, put it out of his power to * object on the * 90 ground of what has been called the unindifferency of the person by whose decision he agreed to be bound. It is to be observed that the person to decide was not a particular individual in whom, notwithstanding his relation to the respondents, the contractor might have so much confidence as to agree to be bound by his award, but any one whom, from time to time, the respondents might choose to select as chief engineer. The appellant alleges that he did not know the fact that Mr. Brunel was a shareholder until more than two years after the works had been begun. But he must have known that the respondents had it in their power to appoint another engineer in Mr. Brunel's place, who might hold shares, or that Mr. Brunel himself might purchase shares. Without the intervention of the engineer, the contract was, as it were, paralyzed ; nothing could be done under it. And it surely can hardly be argued that a person appointed engineer could, by purchasing shares, render the contract practically inoperative. His Honour the Vice-Chancellor of England, when this case was before him, treated it as matter of notoriety that engineers employed in forming the line of an intended railway were almost universally holders of shares. Without going that length, it may be safely affirmed that there is nothing to prevent them from purchasing shares. This must have been known to the appellant, and unless, therefore, he can read the word "engineer" in the contract, as meaning, by necessary implication, "an engineer not holding shares in the intended company," or can import into the contract an agreement on the part of the respondents, that no person hold-

ing shares should ever be appointed to fill, or should continue to fill, the character of engineer, he must be bound by the terms of his own agreement. According to that agreement, he bound himself, on certain points, to abide by the decision of the

* 91 * engineer : he knew that such engineer might be or become a shareholder. If he meant that in such a case the authority of the engineer should not be exercised, he ought to have provided for such a contingency. He has not done so, and has therefore no just ground of complaint.

This, therefore, brings us to the question whether, independently of these two special heads of fraud, the appellant has shown a title to relief. His object is to obtain payment for work done by him for the respondents, under the several contracts to which I have already referred. Now, *prima facie*, this payment ought to be sought not through the medium of a suit in equity, but of an action at law. The right of the appellant is strictly a legal right ; the obligation of the company is a mere legal obligation. The question therefore is, whether there is any thing to transfer in this case the jurisdiction from a Court of law to a Court of equity ; whether the nature of the works to be executed, or the conduct of the parties, during their progress, has given to the appellant any equitable right, has conferred on him a right to sue in equity instead of at law, which, in the case of an ordinary contract to do work for another, would not have existed.

In considering this question, I will, in the first instance, confine the inquiry to the first contract, that designated as the contract 1 B. What then were the appellant's rights under that contract ? — [His Lordship here repeated all the stipulations as to certificates, deductions, and payments, and as to penalties for delay.]

This, then, being the right of the appellant, the case he makes by his bill is, that from the very outset the sums certified were greatly below what they ought to have been ; that this kept him very deficient in funds, and so that he was unable to prosecute the works with the same vigour with which he might have pro-

* 92 ceeded if he had not been * thus unduly straitened for want of money. In these circumstances he contends, that he is entitled to have an account taken of the work actually done, according to what the certificates ought to have been ; that the respondents are not at liberty to insist on any penalties for the

failure in completing the different portions of the works at the stipulated times ; and moreover that they were not at liberty to seize and take possession of the plant, as forfeited by reason of undue delay in prosecuting the works. — [His Lordship here went through the evidence on those points.]

It does not appear to me to be necessary to institute any minute inquiry as to how far the calculations of Mr. Brunel were accurate. I think it is quite enough if they were made *bonâ fide*, and with the intention of acting according to the exigency of the terms of the contract. The respondents expressly stipulated that during the progress of the works the decision of their engineer as to the value of the work from time to time executed should be final. If the appellant thought this a harsh or oppressive clause, he ought not to have agreed to it. It does not, however, seem to me to have been unreasonable. In the absence of express stipulations, a person contracting to do any work for another is not entitled to demand payment till the whole has been completed. The nature and extent of such a work as that which the appellant was to perform might well induce a modification of what, in the absence of express contract, would have been the rights of the parties. But at the same time the respondents might reasonably feel that the extent to which any claim for payment, during the progress of the works, should be conferred on the contractor must be left in a great measure to themselves. It would never do for persons in the situation of these respondents, to put themselves in a position in which a question might be raised with them adversely every fortnight, * as to the extent of their intermediate liability to their contractors. * 93

If, indeed, there was any thing like fraud or unfairness in the case, different considerations might arise ;¹ but the evidence wholly fails to establish any thing of the sort ; I can discover no trace of any desire not to certify fully and fairly the amount due. It may be that in some instances the certificate ought to have been for a higher sum than that for which it was actually given, though no specific instance of the sort has been shown to my satisfaction. The learned counsel for the appellant pointed out what they conceived to be unfairness in the allowances, but on consideration I am of opinion that they were made fairly, and sometimes even favourably for the appellant.

¹ See *Western Bank of Scotland v. Addie*, Law Rep. 1 H. L. Sc. 167.

Supposing, then, that the certificates were such as the respondents were bound to furnish, the next question is, whether in paying to the appellant the amounts so from time to time certified, the respondents were entitled to deduct the amounts due, or claimed to be due, for penalties. Such deductions were made on two occasions : first, on the certificate given on the 12th November, 1836, when the headings through the tunnels were completed ; and, secondly, on the 3d of July, 1837.

On the first of those occasions, a sum of 200*l.* was deducted, being five penalties alleged to be due for delay in completing the headways through tunnels, Nos. 1 and 3, at the specified time. And on the second occasion a deduction of 20*l.* was made as a penalty for delay in the works at the Avon Bridge. These penalties had certainly, according to the express language of the deed, been incurred ; and therefore the point for decision is, whether there was any thing, either in the nature of the penalty, or the conduct of the parties, to prevent the company from insisting on the literal terms of the contract.

* 94 * There is no doubt that where the doing of any particular act is secured by a penalty, a Court of equity is, in general, anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid. On the other hand, it is certainly open to parties who are entering into contracts to stipulate that, on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation.

Whether a sum so fixed is to be considered as merely in the nature of a security for the actual amount of damage incurred, or as an agreed amount of liquidated damages, is often a question of great nicety and difficulty. I am not sure that benefit has, in the whole, resulted from the struggle which Courts, both of law and of equity, have made to relieve contracting parties from payments which they have bound themselves to make by way of penalty. Such a course may have been very reasonable and useful, where the damage resulting from the violation of the contract is capable of being exactly measured. But whenever the quantum of damage is in its nature uncertain, and the due performance of it has been secured, or purports to have been secured, by a penalty, it might perhaps have been safer and more convenient always to have treated the parties as meaning what their language imports ; name-

ly, that on failure to perform the contract, the stipulated penalty should be paid. But this has not always been the doctrine of the Courts. The distinction between a penalty and a sum fixed as the conventional amount of damages is too well established to be now called in question, however difficult it may be to say, in any particular case, under which head the stipulation is to be classed. I shall presently have occasion to state that the sums in this contract made payable under the name of penalties are to be treated * as liquidated damages, and not as penalties to se- * 95 cure something unliquidated. For the present, it is sufficient to say that it certainly was not necessary, for the purpose of raising a question on this point, to file a bill in equity. The question only arises on two certificates. If the appellant considered that the company had no right to deduct the penalties, he had only to bring an action on the certificates and (independently of the question arising from the conduct of the parties) the point would necessarily have arisen and been decided at law. The bill cannot, I think, possibly be sustained on the mere ground that the penalties deducted were not intended as more than a mode of securing to the respondents adequate compensation for the damage arising from the appellant's delay.

But then it was argued, that even supposing the penalties are to be treated as sums actually intended to be recoverable, still the conduct of the respondents, or of Mr. Brunel, their agent, was such as to preclude them, at all events, so far as relates to the 200*l.*, deducted in November, 1836, from insisting on the penalties, whether they are to be treated as sums actually due, or as a mere security for unascertained damage. I am of opinion that this allegation is not made out, in point of fact.

Being therefore of opinion that the appellant has failed to establish any title to equitable relief, grounded either on the alleged inefficiency of the sums certified, or of the deductions made for penalties, I come next to consider whether he has made any case for equitable relief by reason of the course taken by the respondents in taking possession of the works on the 2d of July, 1838. The appellant says, that he was proceeding duly to complete the works according to the terms of the contract, when, on the 2d of July, 1838, the respondents wrongfully took possession of all his stock of materials, tools, and implements, * turned * 96 him off from the ground, and took the completion of the

works into their own hands. This, the appellant contends, was in effect an abandonment, or a repudiation of the contract; so that, without reference to the agreed sum of 63,028*l.*, he is now entitled to have an account taken of the value of the work actually done, and of the machinery, tools, materials, &c. taken possession of by the respondents. I do not think that even if the appellant has made out what he contends for, namely, that in taking possession of the works the respondents were guilty of a wrongful act, that they did what the contract did not authorise them to do, the consequence would have been to entitle the appellant to the relief which he asks. If, while he was duly proceeding to fulfil his contract, he was wrongfully impeded by the respondents, and by them prevented from doing what he had undertaken to do, they would be answerable to him in damages for all the consequences of their wrongful act. Such damages would of course be in part calculated on the value of the plant and other articles of which he had been wrongfully deprived; but the effect would not be to alter the relative position of the parties as to the contract itself, to entitle the appellant to say there had been no contract, or that he was to be paid for what he had done without reference to the contract. That would not be the consequence of the act of the respondents, even treating it as wrongful. The right of the appellant would be, to recover such amount of damages as would put him in, as nearly as possible, the same position as if no such wrong had been committed, — that is, not as if there had been no contract, but as if he had been allowed to complete the contract without interruption. This was his legal right, and I can discover nothing entitling him to any relief beyond that resulting from enforcing that right, — nothing

* 97 that can enable him to * convert a wrongful act which might entitle him to damages into an act which entitles him to an account of work already done, to be taken on terms different from those for which he had contracted.

I have hitherto assumed that the respondents, in taking possession of the works, were guilty of a wrongful act; that they did something not warranted by the contract. But this is not admitted by them; they contend that what they did was warranted by the contract, and so that the appellant has no cause of complaint whatever, either at law or in equity. This question is one partly of law, and partly of fact; and it turns on the clause which

provides for what may be done on the happening of certain events.

The first point to be decided on this clause is one of law. What is the construction of the contract? In what circumstances would the respondents have a right under the contract to take possession of the appellant's tools and materials, and to complete the works themselves?

That a state of circumstances might arise, giving to them such a right, is a matter admitting of no doubt. If, for instance, the appellant had deserted the works in order to prosecute some more profitable engagement elsewhere, there can be no doubt that in such a case the right of the respondents stipulated for by the clause in question would have arisen. How then was it to be decided whether such a right had not arisen? This question can only be answered by attending to the precise terms of the clause; the provision is, that if the appellant shall not proceed with the works to the satisfaction of the respondents, they may give him notice in writing, calling on him to proceed regularly, and then if he shall for seven days make default in regularly proceeding with the works, the respondents may employ other workmen, and act on the clause in question. The respondents might give notice if they * were dissatisfied, reasonably or unreasonably, * 98 with the appellant's rate of progress or mode of proceeding. They were the sole judges of the necessity for or expediency of giving such a notice. Their dissatisfaction with the rate or mode of proceeding was a sufficient reason for such a notice. But when the notice was given, their right to act on it depended not on their view of the appellant's conduct, not on the question whether they were or were not satisfied with him, but on the fact whether, after receipt of the notice, he did or did not for seven days make default in regularly proceeding with the works.

This being the nature of the right, the question becomes one of fact. The respondents having given the notice required by the deed, was the appellant's conduct, after receipt of the notice, such as to justify the respondents in what they did? They must, in order to sustain the validity of their acts, establish as a matter of fact that the appellant did, for seven days after receipt of the notice, make default in proceeding regularly, which, I take it, means proceeding with reasonable skill and diligence in the prosecution of the works. The only evidence directly bearing on this

question is that contained in Mr. Brunel's answers to certain interrogatories, which distinctly declare that he was not satisfied with the appellant's mode of proceeding.

But even if my inference on this point is not just, if, in fact, there was no such default as warranted the course taken by the respondents, still the result was only to confer on the appellant a right of action to recover damages for the wrong inflicted on him, not a right to treat himself as absolved from the contract, and as entitled to be paid for the works he had done, as if it had never existed. So far, therefore, as relates to this first contract, that is, the contract 1 B, the appellant has failed to show any title to

* 99 * the relief which he asks, being in substance a right to payment for the work done unconnected with the contract.

The next contract in point of time entered into by the appellant was that designated in the pleadings as contract 2 B; but I think it more convenient, before I refer to that contract, to dispose of that which is described as 1 B extension. This was not a contract under seal, and therefore, if it must really be treated as an independent agreement, there might be some difficulty in determining the precise nature and extent of the respondents' liabilities under it. They might contend that as a corporation they are not liable on a parol contract. But I do not think that any question of that sort arises, for the contract 1 B extension seems to me on the evidence to be, in fact, only a part of the original 1 B contract, or at all events, that, as between the appellant and respondents, it must be so treated that it must be taken to be a part of that which the appellant was bound to execute under the description of extra works, or of additions to the original works, subject only to certain alterations of price.

By the original contract the appellant agreed that if the respondents should think proper at any time to make any additions to the original works, they should be at liberty to do so on giving to him written instructions for the purpose, signed by the principal or assistant engineer. The respondents by their answer say, that at the time when the original contract 1 B was entered into, it was well known that the railway would have to be constructed between Bristol and the extreme westerly point of the works comprised in the contract, and that for that purpose the works afterwards described as 1 B extension would have to be executed; a part of such works being in fact expressly provided for by the

specification to the original 1 B contract. They go on to say that prior to the month of September, * 1837, the appellant executed a portion of these works, and was paid for the same as extra work, under contract 1 B, and according to the schedule of prices thereto annexed; but that afterwards, a question being raised whether these works were fairly to be considered as coming within the contract, an arrangement was come to between the appellant and Mr. Brunel, according to which the appellant agreed to do the works, but upon a new schedule of prices then settled between them. This statement is fully borne out by the evidence of Mr. Brunel, in his answers to the 8th and 9th interrogatories, and also by the certificates; but it was expressly stipulated that except as to the variation of prices, all the provisions of the contract 1 B should be considered as applicable to the 1 B extension as well as the original works. This evidence does not, I think, leave any doubt as to the real state of the case. What would be the works not included in the specification which might fairly be treated, not as new works, but as additions to the original works, was a question evidently very difficult to decide. The terms of the contract are extremely loose and vague; both parties seem at first to have supposed that the extension works were fairly to be considered as additional or extra works under the contract. For the first six weeks after they were begun in April, 1837, the amount due for them was included in the fortnightly certificate for the works on 1 B. After the middle of June, 1837, a different course was followed; separate certificates were thenceforth given for the extension works; the appellant considering that these works were not fairly to be treated as additions to the original works, but as works altogether separate and distinct, seems to have remonstrated and to have pressed to be allowed for them a more favourable scale of prices. To this Mr. Brunel on the part of the company acceded, but on an express agreement that except * so far as related to the * 101 new scale of prices, the old contract 1 B should be deemed to be in force; that is, in effect, that the works of 1 B extension should (subject to the variation in the prices) be considered merely as an addition to the original works within the terms of the contract. It is not necessary to consider the question glanced at in the argument, whether this was an arrangement which Mr. Brunel could make so as to bind the company; the terms so

arranged were the terms according to which the works were in fact done, and though the terms stipulated for by the contract, namely, that the authority for any additional works should be in writing, signed by the engineer, were not (so far as appears) adhered to, yet it certainly is not open to the appellant, having done the works on such a parol contract, to reject its terms and to claim remuneration on a *quantum meruit*, as if no such express agreement had been come to. It might have been open to argument on the part of the respondents, that they are not bound to pay for works done under the terms of a parol contract made with their agent, and not authorised by them; but they have not raised such a point, and certainly the appellant can have no right, beyond that which the parol agreement confers on him; if the respondents are in the circumstances of the case bound at all (and they do not dispute that they are bound), it can only be by an obligation to fulfil the terms of the contract entered into by their agent; all the consequences incident to the other contracts followed therefore with regard to this extension work.

With respect to the other point, the seizure of the plant on the 1 B extension, by reason of the default in not proceeding regularly after the notice of the 23d June, 1838, I have already stated that in my opinion the evidence clearly makes out the fact of the default, and the consequent right of the company to make the seizure, assuming it to be clear (as I do) that the terms of the original 1 B contract governed the extension contract also. I must, however, here repeat what I stated as to the original contract, that whether the default of the appellant is or is not made out, does not appear to me material with reference to this suit. Even if there had been no default at all, he would have no right to the equitable relief he asks, though he would in such case certainly be entitled to full compensation by way of damages for the wrong inflicted on him. On these grounds, I think that the appellant's claim to the relief which he asks, so far as relates to the extension contract, is as groundless as that in respect to the original contract. In each case he has alike failed to establish what he contends for, namely, a title to be paid, as if no contract had existed.

This brings me to the consideration of the 2 B contract, which was in its terms nearly the same as the 1 B contract. All the reasons on which I have relied, as showing that there is nothing

entitling the appellant to the relief he asks in respect of the contract 1 B, apply also to this second contract, except indeed that the evidence does not appear to make out, without inquiry, that he did not proceed regularly, that is, with due skill and diligence, after the receipt of the notice. I do not think it necessary therefore to say more on the subject of the second contract.

The only remaining contract is that designated as 8 L, in the London and Reading contract; this contract bears date the 30th of August, 1836, being between five and six months after the date of the first or 1 B contract, and nearly four months after the date of the second or 2 B contract; the portion of the line to which it relates is a distance of about six miles from the Caversham Road, at or near Reading, eastward towards London; the sum to be paid by the company to the plaintiff was 186,344*l.*; the *contract is framed substantially on the same principle as *103 the two preceding contracts.

The first point made by the appellant as to this part of the works is, that he is not bound in reference to them by the contract 8 L, inasmuch as that contract related not to the line actually proceeded with, but to a different line, the construction of which was eventually abandoned. For this argument I cannot discover the slightest foundation. By the express terms of the contract the respondents were authorised to make any alterations in the works contracted for which they might deem expedient, and I cannot conceive any thing more legitimately coming within the meaning of an alteration than a carrying of the line one or two hundred yards to the south, avoiding thereby the necessity of a tunnel. [His Lordship here referred fully to the evidence to show that the deviation was required, and that at the time the appellant did not object to it; and he then narrated the circumstances under which the respondents had taken possession of this portion of the work.]

The original bill was filed on the 21st of July, so that it did not, indeed it could not, make mention of the notice of the 30th of July, or the subsequent seizure of the plant on the 20th of August. These new facts were, however, brought before the Court by the bill of revivor and supplement, filed on the 5th of March, 1840, by which the appellant seeks relief in respect of this 8 L contract, similar to what he sought by the original bill in respect to the Bristol contracts. There is nothing to distinguish this 8 L contract from the others on the general question of the relief asked,

and it is therefore unnecessary to repeat the observations already made.

Having thus considered all the contracts one by one, I will now look to the prayer of the bill to see how far the appellant * 104 makes out a title to any part of the relief which * he asks.

He first asks a declaration, that as to the contract 1 B, he was imposed upon in respect of the strata through which the tunnels and cuttings were to be made, and so that he is entitled to be paid for these works at fair prices without regard to the contract. I have already stated that no such case of imposition appears to me to be made out, so that all title to relief founded on it falls to the ground. The appellant then asks, secondly, a declaration that all the clauses in the different contracts giving any authority to Mr. Brunel as the principal engineer of the company are fraudulent and void as against the appellant, with a declaration that he is not bound by any certificates given by Mr. Brunel. On this head, also, I have already fully stated my reasons for thinking that the appellant has no ground for complaint, and is, therefore, entitled to no relief.

The next head of relief asked by the bill has reference to the taking possession by the respondents of the works at Ruscombe, on the 8 L line, and of the tunnel No. 3 in the 1 B contract, according to the arrangement embodied in a paper dated the 18th of April, 1838, set out in the pleadings. The bill prays a declaration that these acts of the respondents, as well as the obtaining from the appellant of his signature to the paper in question, were fraudulent and void. It is unnecessary to consider these branches of the case, for they were abandoned by the counsel in argument at the bar. The bill then prays a declaration that the appellant did not incur any penalties, or if he did, then that they were waived, or that the appellant is entitled to be relieved from them. I have already stated my opinion, that what are in these contracts called penalties are, in fact, fixed sums agreed upon as the conventional amount of damages to be paid by the contractor in the event of his failing to execute certain portions of the work

* 105 * before certain defined times; nothing could be more reasonable than such a stipulation. It was obviously of vital importance to the respondents to get the works completed by a stipulated time, and in order to secure this object they made it a matter of positive contract that certain particular portions of the

work should be finished by certain specified times ; and on failure to fulfil this engagement the contractor bound himself to pay certain stipulated sums, increasing every week, as the increased delay might be likely to be more and more injurious to the respondents. All the circumstances which have been relied on in the different reported cases as distinguishing liquidated damages from penalties, are to be found here. The injury to be guarded against was one incapable of exact calculation. The sum to be paid is not the same for every default, for that which should occasion small as for that which should cause great inconvenience, but one increasing as the inconvenience would become more and more pressing ; and, finally, the payments are themselves secured by the penalty of a bond ; and this is hardly consistent with the notion that the payments secured were themselves the very penal sums provided to secure something else. For these reasons I think it clear that these payments, though called penalties, are in truth liquidated damages agreed on by the parties, and which the respondents might set off against the demand of the appellant upon them under the contract. But then the appellant contends that the respondents never had a title to recover these penalties, because the delays in respect of which they are claimed were produced by the harassing and vexatious conduct of the respondents themselves, or their agents. It is sufficient on this head to say that the appellant, in my judgment, wholly fails to make out in point of fact the proposition for which he contends.

* The bill next prays a declaration that the respondents *106 were not entitled to give the notice of the 23d of June, 1838, under which, on the 2d of July following, they took possession of all the plant and works on the contract 1 B and 2 B, including the 1 B extension ; and further, a declaration that they were not justified in taking such possession, and that they may be ordered to account for, and pay to the appellant, the value of the plant and property of which they so unjustly possessed themselves.

The supplemental bill prays a similar declaration, and similar relief, in respect to the plant and stock on the Reading line, of which the respondents took possession on the 25th of August, 1838. The right of the company to take possession of these works depends on the question whether, after the giving of the notices, the appellant did or did not make default in regularly

proceeding with the works. If he did not, then the respondents, or their servants, were trespassers, and so were responsible in damages. This, however, is not the right insisted on by the appellant. The bill, after asking the declarations as to the seizures to which I have referred, goes on to pray for accounts of what is due to the appellant, on the footing of there never having been any contracts, or of the contracts having been abandoned ; and this is clearly an erroneous view of his rights, whether the seizures were, or were not, justifiable. The bill prays further, that, in taking the accounts of what is due to the plaintiff, it may be ascertained what was due to him at the several dates of the different advances made to him by way of mortgage, and that those advances may be treated, to the extent of the sums then due, as being payments and not loans, with all necessary consequential directions. This relief is asked on the notion that the sums to be treated as actually payable, from time to time during the progress of the works,

* 107 * were not the sums certified by the engineer, but such sums as the Master should find to be the real value of the work done, disregarding the contract altogether. This, as I have already explained, is an erroneous view of the appellant's right. The contracts cannot be disregarded ; and, according to the contracts, nothing was payable during the progress of the works, except the sums certified ; and, at the times of the several mortgage advances, all these sums had been fully paid. The respondents, therefore, had a clear right to the full benefit of the securities given by the appellant for the several advances made by way of loan on mortgage of the plant, the stock, and the reserved funds, and the appellant could not be entitled to an account on any other principles. The bill then prays, lastly, that an account may be taken of the engines, tools, materials, articles, and things of which the respondents took possession, and that they may be debited in account with the value thereof, with interest for the same. The right of the appellant to such an account depends on the question whether, according to the true construction of the agreement, the respondents were, on taking possession of the plant, to become absolute owners of it to all intents and purposes ; or whether the possession was only to be for the purpose of enabling them to go on with the works, and to complete them at the risk and cost of the appellant, holding the plant as a security, so far as it would go, for whatever outlay, if any, they might have to

make, beyond what they would have had to pay under the contract in case the appellant had duly performed his engagements.

The provisions of the contract are very explicit. First, upon the appellant's default, after the seven days' notice, the respondents were authorised to proceed and complete the works themselves, paying for the same out of the money then remaining due to the appellant on account of * the contract. *108 Secondly, the payments then already made to the appellant were to be taken as full satisfaction for all works then already done by him. Thirdly, all money then due, or which would thereafter have become due to him under the contract, and all the tools and materials in and about the works, were to become the absolute property of the company. And, fourthly, if the monies, tools, and materials so to become the property of the company should be insufficient to cover all charges occasioned by completing the works, then the appellant was to make good the deficiency.

I assume that, in taking possession of the plant, the respondents did no more than, under these clauses, they were warranted in doing. The question is, whether, having taken possession, they became absolutely entitled to all which they seized, or whether the whole provision is not to be regarded as mere machinery for enabling them to complete the works, at the risk and cost of the appellant. I think the latter is the true construction of the clauses. When I was considering the question whether the penalties for delay were to be treated as mere penalties to secure the due performance of the work, or as liquidated damages to be paid for each default, I observed that one argument, leading strongly to the latter conclusion, was founded on the uncertain nature of the damage to be provided against; that is to say, on the impossibility of saying (as matter of mere calculation) how much the respondents were prejudiced by the fact that a particular portion of the work was delayed for a week, or a fortnight, or a month. This, of itself, afforded strong ground for construing the clause as meaning to fix the amount of damage, as being intended to make certain what was otherwise uncertain. But this test fails in the clauses now under consideration. The object of these * clauses was to enable the respondents to do, at the cost of *109 the appellant, the work which he had failed, or seemed likely to fail, in doing himself. The amount of their damage was capable of exact admeasurement. It was the sum which they

should expend in doing what the appellant ought to have done less the amount payable to the appellant. In such a case, if the property seized is made available as a fund for indemnifying the respondents, all the ends of the clauses in question are fully answered.

It is to be observed, that the property seized comprised (*inter alia*) the three reserved sums of 4000*l.* each. It could hardly have been in the contemplation of the parties that, without reference to what the respondents should be obliged to spend in completing the works, they should be at liberty to appropriate to themselves three sums of money, amounting to 12,000*l.*, and that, too, even though the work remaining to be completed might not amount to 1000*l.* But further, it was clearly contemplated that the respondents should keep an account, not only of all which they expended in completing the works, but also of all which they made by the tools and materials seized ; for the appellant was to make good any deficiency, and the amount of deficiency could only be ascertained by keeping accounts of all which was realized ; and if accounts were to be kept for the purpose of charging the contractor with the deficiency, it can hardly be supposed to have been the intention of the parties that, if there was a surplus, the respondents should retain it for their own use.

Again, it is to be observed, that the right of the respondents to make the seizure would, in case of seven days' default after notice, arise at any period of the contract ; that is, when work to the amount of only 1000*l.* or 100*l.* remained to be done, as
 * 110 well as when work to *the amount of 50,000*l.* was incomplete. The evidence as to the value of the plant is conflicting, but it could hardly be stated, on a rough estimate, at less than 10,000*l.*, in addition to which there were the three reserved sums of 4000*l.* each. Now, it could hardly have been intended that the respondents should be at liberty to appropriate to themselves the whole of this large stock and these sums of money, without reference to the amount of what remained to be done ; that they should be at liberty to make a profit, and it might be a very large profit, from the default of the appellant. There are cases in which the mere fact that the same sum is made payable for a small default as for a large one, has been held to prove that the sum so payable was meant merely as a penalty to secure the due performance of the act intended to be provided for, and not as a sum really recoverable. The same principle is applicable

here. A default on the part of the contractor might be very injurious at one stage of the works, and very unimportant at another. So long as a large portion of the works remained to be done, a large fund might be necessary to indemnify the respondents, when driven to undertake the prosecution of the work themselves. But when very little remained to be done, that which was only a reasonable security in the former case would become excessive.

On these grounds I have come to the conclusion that the true meaning of this part of the contract is, that the respondents, though at liberty to seize and appropriate the plant belonging to the appellant, were yet bound to account for its value in settling their accounts with him.

Having thus gone through the several points of the case, it now only remains to consider what the precise decree ought to have been, and how far it requires correction.

* The appellant complains of a portion only of the * 111 decree. The respondents complain of it altogether, contending that the bill ought to have been dismissed. The observations I have made show that I do not agree with the view of either party. I am not prepared to say that the appellant was not entitled to some relief, — I certainly do not think he was entitled to what he asked, — and it therefore, in this state of things, becomes necessary to consider what the decree below ought to have been.

In the first place, then, I think that so much of the several bills as seeks a declaration that the plaintiff was imposed upon in respect to the strata on the line 1 B, and all declarations and relief consequent thereon, and as seeks to impeach the right of Mr. Brunel to act as engineer, by reason of his being a shareholder, and as seeks a declaration that the respondents, in possessing themselves of the works at Ruscombe Hill and the tunnels on the 1 B line, took undue advantage of the plaintiff, with all consequential relief thereon, and as seeks a declaration that the plaintiff's signature to the paper of the 18th of April was obtained by fraud, with all consequential relief thereon, and as seeks a declaration that the plaintiff had not incurred any penalties under the contracts, and was entitled to be relieved therefrom, and as seeks a declaration that the defendants were not entitled to take possession of the works, and to give the notices for that purpose, and that by such taking possession the plaintiff was relieved from all

obligation under the contracts, and that the same must be considered as abandoned, ought to be dismissed with costs.

But the appellant is entitled to a decree to the following effect: First, an account must be taken of all sums properly expended by the respondents in completing, according to the terms and
 * 112 conditions of the several contracts, *the works thereby respectively agreed to be done by the appellant, including extra works, with a declaration that, for the purpose of such accounts, the 1 B extension ought to be deemed to be part of the original 1 B contract.

Secondly, an account must be taken of what is due to the respondents for principal and interest on the several advances made by them, by way of mortgage, in the year 1837.

And it ought to be declared that the appellant is chargeable in account with the respondents for all sums so expended by them in the completion of the works, and also with what shall be found due in respect of the said mortgages. Against what shall be found due from him on these accounts the appellant is entitled to have an account of what would have been payable to him under the contracts at the completion thereof in case the works had been finished by him, instead of being completed by the respondents; and also an account of the value of the plant, materials, and other goods, of which the respondents took possession in the months of July and August, 1838.

And it must be declared that in taking the foregoing accounts the appellant is chargeable with the sum of 200*l.*, with which he was debited in a certificate of the 11th of November, 1836, under the head of penalties; and that he is also chargeable, by way of liquidated damages, with all other sums which shall have become payable by him under the conditions of the several bonds executed by him, in the penal sums of 4000*l.*, 4000*l.*, and 5000*l.* mentioned in the said three contracts, 1 B, 2 B, and 8 L respectively, save only so far as the appellant shall show, to the satisfaction of the

Court, that the delay or default in respect of which any
 * 113 such liquidated * damages are claimed was occasioned by the act or default of the respondents, their agents, or servants, and save also that no penalty is to be deemed payable under the said bonds respectively, from and after the time when the respondents took possession of the works to which such bonds respectively related.

The third bill, that I mean relative to the particular nature of the masonry work done, was wholly unnecessary, and must be dismissed with costs. I do not think it necessary to consider whether it was, as is alleged by the respondents, demurrable. It was certainly, with reference to the only accounts to which the appellant is entitled, quite unnecessary. The masonry work, as to which this question arises, was either work included in what was to be done for the original contract sums, or it was extra work, to be paid for differently. I collect that it was chiefly of the latter description; but this matter, and the sufficiency of the amount certified, will form proper subjects for discussion in the inquiry which must now take place. I can discover no reason whatever for a separate bill on this subject; it is merely a dispute as to a particular class of items in the accounts to be taken. The filing of a separate bill for such a purpose was altogether unnecessary, and the costs must be borne by the appellant.

I have thus gone through the whole of this long and complicated case, and the course which I respectfully recommend to the House is, that your Lordships should declare the rights of the parties to be such as I have just indicated, and, with such a declaration, to refer it back to the Court of Chancery to deal further with the case as justice may require.

The appellant, by the terms of his bill, expressly submits to pay what, if any thing, should be found due * from him, *114 so that after the accounts have been taken, full justice may be done to both parties.

I do not recommend your Lordships to make any order as to the costs of the appeal. Each party must bear his own.

LORD BROUGHAM. — My Lords, we have at length arrived at the end of this very long case, which has been twice heard before this House, and on each occasion at great length; the death of our noble and learned friend, Lord Chancellor Cottenham, having prevented the House from coming to a decision upon the former occasion. I cannot sufficiently express my admiration of the great clearness of the statements of my noble and learned friend who has so ably gone through the whole particulars of this case, or of the acuteness, only to be equalled by the patience, which he has shown in bringing the whole of these matters before the House. It is for me only to address a few observations to your

Lordships upon those parts of the case on which I had originally entertained some doubt, both in the former session and in this; and I think it better that I should confine myself to those points than that I should endeavour to follow my noble and learned friend over the whole ground over which he has gone.

The first three prayers of this bill refer to fraud and imposition. The first alleged imposition is respecting the fallacious representations which have been made touching the kind of stone through which the railway was to be made. The second is respecting the possession of shares by the engineer, Mr. Brunel, unknown to the appellant; and the third relates to the obtaining fraudulently the signature of Mr. Ranger on the 18th of April. Upon one only of those three heads am I about to offer any remarks

* 115 * to your Lordships. I mean the second, that which relates to the possession of the shares by the engineer, upon which I certainly originally entertained very considerable doubt. But upon further consideration of the particulars of the relative position of the principal engineer and the company, and also of the relative position of the engineer and the company on the one hand, and the contractor on the other, I have fully made up my mind to agree with my noble and learned friend in the conclusion, that this transaction does not, when well and duly considered, support the claim of the appellant. The position of the engineer was such that he really may be said, in some respects altogether, and in all respects almost, to have represented the company; he may almost be taken for the company. The case of *Dimes v. The Grand Junction Canal*¹ is that of a Judge, a person clothed with high judicial functions, being found to have been a party in the case, from being interested in the subject matter which came before him for his decision. We have here the case not of a Judge, nor indeed of any thing like a Judge; the utmost that he can be said to be is a kind of referee to whom certain matters were, by the agreement of the parties, to be referred, I will not say for his arbitration, but rather for his report and decision. In some instances it is even found that the company and he are referred to in the alternative. However, looking at him in those matters in which he may, to some extent, be said to decide judicially, I consider that there he was the known officer of the company, and his decision as such was accepted. He is not named personally as Mr. Brunel, but as "the principal en-

¹ 8 H. L. Cas. 759.

gineer for the time being"; whatever principal engineer the company appoints is to give certificates and to make payments.

Nay, moreover, he is to decide, as it were, upon * appeal * 116 from the assistant or resident engineer, for it is provided that the resident engineer differing with the contractor upon any of these matters the principal engineer is to decide. Then, was it not known to the contractor that Mr. Brunel was the principal engineer of the company, was largely interested on the side of the respondents as their paid servant, and largely profiting by his connection with them? Was it not known that he might hold shares in the company? Was it not generally understood amongst engineers (though I do not go so far as the Vice-Chancellor of England, who said it was notorious that in all instances the engineers were shareholders), and must it not have been very well known to Mr. Ranger that it was an ordinary case for the engineers to hold shares? He might have made that an exception in the contract, and required that the engineer should not hold shares, but that provision has not been made. Besides, the interest which the engineer had in shares was perfectly trifling compared with his general interest arising out of his connection with the company. Had this proviso been made this absurdity would happen, to which my noble and learned friend has adverted, that although not possessed of shares at that time, he might any day have become possessed of shares; he might have purchased them or inherited them; they might have come to him by devise, and then he would have been put in this position, that he must either have given up what had come to him or have ceased to be the engineer employed by the company, for if he had continued possessed, either by purchase or inheritance, of a single share, according to the rigour of the argument deduced from *Dimes v. The Grand Junction Canal*, he must have ceased to act under these covenants, and the whole operations of the company must at once have been convulsed.

I think, therefore, that there is no ground for considering * that the position in which he was placed was a *quasi* judicial position. I think it is clear that he was the company; that the contractor considered him as the company, and that in all matters, as in this, the interests of the company and of the engineer were the same, and that, with his eyes open, the contractor put himself, to a certain degree, in the hands of the company, only

securing himself by the express stipulations which are made to limit the discretion of the company. For I look really upon Mr. Brunel, the principal engineer for the time being, as in this case the company itself.

My Lords, I have known cases, and I suggested an instance during the argument at the bar, in which in private local Acts of considerable importance there has been an express provision that certain judicial proceedings shall take place, in which a jury shall be impanelled, and shall act under one or other of the directors of the company. Although the company is, in fact, the party interested, yet one or other of their directors, as I have seen, while at the bar, sits to direct the jury, to dispose of questions of evidence ; and this is the case, although they were, in fact, the parties between whom and the claimant to compensation the whole proceedings were then going on. An arrangement of this sort, for the convenience of the work and of both parties, appears to have been voluntarily entered into by the parties to this suit.

The next head upon which I should wish to make a few observations, is one upon which I certainly had some doubt during the argument. I mean whether the evidence was sufficient, on that part of the bill which relates to the taking possession of the plant, to show that the respondents were justified in that proceeding.

But, even if I had still a doubt upon that question, I entirely * 118 agree with my noble and learned friend, that this * would have been the ground of an action of trespass ; and that, in fact, the fourth prayer of the bill is really turning an action of trespass into a bill in equity ; it is calling upon a Court of equity to give damages for a trespass. Because, if there was no sufficient ground for the seizure, if the respondents were trespassers, an action at law might have been maintained against them for damages on account of the seizure.

But in the sixth prayer another view is taken of the matter ; the first prayer is for an account and for damages, equitable damages under the contract, a kind of fusion of law and equity being attempted in this case ; equitable damages for wrongfully taking possession, because, though notice had been given, there were no laches on the part of the appellant. But the sixth prayer is to pass by the contract altogether, and in respect of the tortious possession to disaffirm or set aside the contract, and to give the contractor the benefit of a *quantum meruit*, as if there had been no

contract. Now I entirely agree with my noble and learned friend, that this is what we cannot do, and what the Court of Chancery, from which the appeal proceeds, could not do, and that the appellant must be left, on that ground, to his action at law, and that this act of the company assuming it to be tortious did not get rid of the contract, and entitle him to go beside, above, or beyond it, and to obtain the account thus sought for. Nor do I think that the deviation in the line put an end to the contract, and enabled the appellant to call for an account in equity, as on the principle of a *quantum meruit*; for a deviation of one hundred or two hundred yards, for a short distance, was no more than might have been expected in such a contract, and here the evidence does not show it to have been injurious to the appellant.

The last point, upon which I have a word to say refers to the question of liquidated damages; and I greatly lament * 119 that the law should have been laid down as it has been by cases, upon which it is too late now to make any comment, except to express one's regret. I think this has been lamented, formerly, by learned Judges; and although Lord Eldon very cautiously, as was his wont, expressed himself on this matter, yet it is impossible to read his observations in *Astley v. Weldon*,¹ without seeing that he was dissatisfied with the previous decisions. He expresses the great difficulty which he had often found in making his way through these cases; and I think there can be little doubt that he rightly lamented the course which the law had taken. But, my Lords, it is now too late to alter this, and we are in every case bound to consider whether we are to grant liquidated damages, or penalties, according to the principles that those cases have established. According to those principles, I have no doubt whatever that in this case liquidated damages are due as regards the fourth prayer of the bill, in respect of injuries sustained by the respondents from the appellant's delay, in a case in which that delay was increasing, and in which no specific sum could be apportioned in respect of a particular injury done to the respondents. In those cases, I agree with my noble and learned friend, that we must consider the sum mentioned as liquidated damages, as a compensation to the company for the loss sustained by the delay. In the other case, it is equally clear, upon the principles laid down both in *Astley v. Weldon*, to which I have referred, and also in *Kemble*

¹ 2 Bos. & P. 346.

v. *Farren*,¹ that it is to be taken as penalty. The learned Lord Chief Justice, in giving in the latter case the decision of the Court, says: "It is difficult to suppose any words more explicit or express than those used in the agreement; the same declaring not
 * 120 only affirmatively that * the sum of 1000*l.* should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof." Yet, nevertheless, because there were in that case some things more specific, and others less specific or more general, the Court thought itself bound by the current of cases, to draw that distinction between the two; and, in spite of the positive and distinct statement of the meaning of the parties, the Court felt compelled to consider that the parties did not mean that statement to be taken as applying to the whole, but only as to a part, and therefore to decide that one part of the sum should be penalty, although the party had said that none should be penalty, and that the other part should be liquidated damages, although the parties had declared that the same character should apply to the whole.

However, my Lords, we have no choice in the instance that I have referred to, as to the fourth prayer of the bill, but to consider them as liquidated damages. And with regard to the other, we must consider them as in the nature of penalty. The result is, as has been stated by my noble and learned friend, that we must decide against the appellant, both on the original appeal, and upon the cross appeal. But, my Lords, I fear that we cannot say that we shall put an end to this case; it must undergo some further inquiry in the Court of Chancery upon the matters which have been mentioned by my noble and learned friend.

THE LORD CHANCELLOR.—The declaration is substantially what I stated. There must be an account taken in favour of the appellant, of what would have been favourable to him if he had been allowed to complete the contract, also the value of the stock.
 * 121 On the other hand, he must be charged with * all sums of money properly expended in completing the works that he was bound to complete, and also to be charged with the sums due on mortgage. And, under the bonds, the penalties.

Decree reversed with declarations and remit.

Lords' Journals, 26 May, 1854.

¹ 6 Bing. 141.

SYNNOT v. SIMPSON.

1854. May 16, 18, 19, 30.

MARCUS SYNNOT, and others, *Appellants.*
 The REV. JOHN EDWARD HENRY SIMPSON and } *Respondents.*¹
 others, }

Trust for Creditors.

A. and B., father and son, executed in 1818 an indenture of settlement on occasion of the son's intended marriage. The father and son, the lady and her father, and other persons, trustees, were parties to the indenture. Certain freehold estates were conveyed to the trustees for A. for life, remainder to B., and these estates were exonerated from debts due by A., which debts were made charges on certain leasehold premises expressly named. These premises were vested in trustees, on trust (among other things) to keep down the interest of A.'s debts affecting any of the estates comprised in the deed, and they were empowered "with the desire and consent" of A. and B., and notwithstanding any of the trusts therein contained, to sell the leasehold premises so put in settlement for the payment of the debts and encumbrances. Another deed was executed by A. and B. in 1824, which recited the former, appointed new trustees, added new debts, and made provision for the payment of all. The trustees never acted in discharge of the trust, and the deeds were not communicated to the creditors, but B., who by an arrangement with his father had possession and management of the estates, paid the interest on the debts. After the deaths of both A. and B., the son of the latter entered into possession of the estates. C., a bond creditor, whose name and claim were set forth in the schedule to the deed of 1818, filed a bill to have the trusts of that deed carried into execution. The Court of Chancery in Ireland held that this debt "was within the trust contained in the indenture for the payment of the scheduled debts."

On appeal, this decision was affirmed, Lord St. Leonards *dissentiente*.

* ON the 30th May, 1799, Francis Synge and Dorothy *122 Hatch (his mother in law), both of St. Sepulchre's, in the county of Dublin, granted unto the Rev. John Simpson, of Cuffe Street, Dublin, a bond, conditioned in the sum of 1000*l.*, to secure payment of a sum of 500*l.*, with interest. On the 10th of May, 1817, Francis Synge granted to the Rev. John Edward Henry Simpson, the son and representative of the former obligee, a bond, conditioned in the sum of 3400*l.*, to secure payment of the sum of 1700*l.*, with interest. On the 17th April, 1818, on occasion of the

¹ *Montefiore v. Browne*, 7 H. L. Cas. 251.

marriage of John, the eldest son of Francis Synge, with Miss Hamilton, an indenture of settlement was executed, to which Francis and John Synge, the lady, her father, and her trustees were parties. It recited the settlement made on the marriage of Francis Synge in 1786, and the limitations of the estates thereby settled, and provided that some of such estates should be set apart in exoneration of others to provide for rents, renewable fines, and keeping down interest and encumbrances, and for payment of such debts as were thereafter mentioned. Certain freehold and leasehold lands, situated in the counties of Meath and Sligo, and the city of Dublin, were settled to the use of Francis and John Synge until marriage, then to trustees for ninety-nine years; remainder to Francis Synge for life; remainder to trustees to secure jointure, &c.; remainder to first and other sons, &c.; similar provisions were made with respect to lands in Wicklow; and then there was a conveyance by Francis Synge to J. D. Latouche and E. S. Cooper of certain lands at Kilberry and St. Sepulchre's, Dublin, held on leases for lives, renewable for ever, upon trust, out of the rents to pay head rents, &c., keep down the interest upon debts and encumbrances affecting the several estates in the said indenture granted,

due by Francis Synge, and specified in a schedule thereto;
 *123 remainder to Francis Synge for life, without *impeachment, &c.; remainder to John Synge, his heirs, &c., and his executors, &c. The leaseholds thus settled were to be subject to the debts and encumbrances of Francis Synge, specified in a schedule annexed (except a mortgage for 3500*l.*): these debts were to be liens and charges thereon in exoneration of certain premises in Glover's Alley and York Street: this mortgage was to be a charge on those premises only, some property at St. Sepulchre's being expressly exonerated from it. Other provisions were then made, and a present income during the life of Francis Synge was to be secured to John Synge, amounting to 600*l.* a year, and in case of his death during the life of his father, to his intended wife, to the amount of 500*l.* a year. Certain lands at Glasnamullen and Roundwood (indemnified against the debts of Francis Synge in his lifetime) were leased to John at a peppercorn rent in satisfaction of this arrangement, and were so accepted by him; and there was a declaration that the lands vested by the settlement in the trustees for payment of debts might, notwithstanding any of the trusts, be sold by the trustees for the payment of the debts

and encumbrances then charged thereon, with the desire and consent of Francis or of John Synge, or the survivor of them. The respondent was the eldest son of this marriage.

In July, 1824, another deed was executed by Francis Synge the elder, which recited the former one, appointed other trustees, and made, among other things, several provisions for carrying the former deed into effect. This new deed added considerable charges to the lands already put in trust for the payment of debts. The trustees never interfered, and no notice was given by them to the creditors mentioned in the schedule annexed to the deed of 1818, but John Synge paid interest on the debts according to the deed, * and he and his son Francis wrote to creditors * 124 offering to pay them off unless they would accept a lower rate of interest.

Francis Synge, senior, died in 1831, and by his will, which bore date 10 July, 1815, gave to his son John all his real and personal estates, and appointed him executor. John Synge died in 1845, leaving all his real and personal estates to his eldest son, Francis Synge, junior, subject to the payment of debts and legacies.

On the 13th of April, 1847, a bill was filed in the Court of Chancery, in Ireland, by a creditor of John Synge, on behalf of himself and the other creditors, praying for an account and administration of the real and personal estate of the said John Synge.

The Rev. John Edward Henry Simpson, on the 2d August, 1847, filed his bill (which was duly amended in January, 1848), against Francis Synge, junior, the appellants and several other persons, setting forth the two bonds already stated, and the indentures of April, 1818, and July, 1824, and praying that the said bonds might be declared to be the same bonds as those described in the schedule to the indenture of 1818,¹ and might be declared to be well charged by the indenture and schedule on the lands and premises therein mentioned, and asking for an account, &c., and that the premises might be sold and the proceeds applied in discharge of the said bonds. Answers were put in, and the causes came on for hearing before Lord Chancellor Brady, who on the 15th June, 1849, made a decree by which he directed the Master to take an account of what was due to Simpson on the two bonds, and it was declared that the bonds were identical with

¹ This was necessary, because the bonds had been misdescribed in the schedule. There was no real doubt as to their identity.

those mentioned in the schedule to the indenture of April, *125 1818, and were "within * the trusts contained in the indenture for the payment of the said schedule debts; and it was further declared that the said John Synge, deceased, took the trust lands and premises comprised in the said indenture of April, 1818, upon the trusts in the said indenture stated, and amongst others, subject to the payment of the interest to grow due on the said respective bonds, and that the interest then due and thereafter to grow due, were respectively well charged by the said indenture on the said trust lands," &c.

The appeal was brought against this decree.

The Solicitor-General (Sir R. Bethell) and *Mr. Teed* for the appellant. — There was not in this case any trust created for the benefit of third persons. The creditors were not parties to the deed, and cannot therefore enforce it, for there is no contract with them which alone can give them such a right. The deed was made for the convenience of two parties, father and son, who arranged out of what property certain debts should be paid, and what property should be settled, independent of those debts, and no third party, who had nothing to do with the deed, can claim that it should be treated as a trust for his benefit. There was no such communication made to the creditor as would influence him in his conduct regarding the enforcement of his debt, and consequently no interest was given him on which he can ask for the interference of the Court. *Bill v. Cureton*¹ shows that except the characters of trustee and *cestui que trust* have been expressly created by the deed, there is no power to enforce its provisions, but it may be revoked by the person who voluntarily made it. *Garrard v. Lord* *126 *Lauderdale*,² and *Walwyn v. Coutts*,³ * are to the same effect, and both were considered and observed on in *Bill v. Cureton*. No trust has been actually created here.

The earliest case on this subject is that of *Worrall v. Harford*,⁴ where it was held that the indemnity given to trustees under a deed of trust does not give the persons employed by them a right, as creditors, against the trust funds. *Gibbs v. Glamis*,⁵ on appeal before the Lord Chancellor,⁶ enforced the same principle.

¹ 2 Mylne & K. 503.

⁴ 8 Ves. 4.

² 3 Sim. 1, 2 Russ. & M. 451.

⁵ 11 Sim. 584.

³ 3 Sim. 14, 3 Mer. 707.

⁶ 11 Sim. 591.

[LORD ST. LEONARDS. — And applied it to a still greater extent.]

The case of *Browne v. Cavendish*,¹ which was decided by Lord St. Leonards, in Ireland, seems the other way. There it was held that voluntary settlements and voluntary conveyances to trustees for payment of debts differ; that when, under a voluntary settlement the fund has been actually vested in trustees, though there has been no consideration for the creation of the trust, and though the fund has got back by accident into the possession of the person who created the trust, yet the trust may be enforced for the benefit of volunteers, for the relation of trustee and *cestui que trust* has been created. But there it was expressly stated that the claim must depend on the manner in which the deed had been acted on. Applying that rule here, that case is not an authority against the appellants. The distinction too was taken between deeds founded on contract and deeds where no contract had given rise to them, but where they were mere arrangements for the convenience of the parties making them. The latter, which could not be enforced, are of the nature of the deed which has been executed here, and that brings this case *more within that of *Simmonds v. Palles*.² *Evans (or Law) v. Bagwell*³ is in point. There P. was an encumbrancer on an estate to the extent of 2000*l.*, which he had advanced as an intending purchaser, but the purchase was broken off, and the estate was settled upon the marriage of the son of the vendor, and in that settlement there was a trust for payment of debts, and P. was named in the schedule to the settlement, but he was not a party to that settlement, and so he was held not entitled to maintain a bill for the performance of the trusts. The rule there acted on must govern the present case.

The respondent Simpson contributed nothing to this deed, and his right to an action at law upon his bond is not affected by it. He cannot therefore have any claim under it. The deed is a mere voluntary deed, making an arrangement between the father and son, but not changing the existing rights of any other parties, and not giving them any new rights. The creditors could neither have compelled nor prevented any different arrangement of the property; their rights against it remain untouched by the arrangement, and the authors of that arrangement can at any time change it.

¹ 1 Jones & Lat. 606.

² 2 Jones & Lat. 489.

³ 4 Drury & War. 398, 2 Con. & L. 612.

The death of Francis Synge did not change the nature of this arrangement, nor make it more a trust than it was before.

Mr. Napier and *Mr. Rolt* for the respondent.—The decree below is right. This was not a mere voluntary arrangement between the father and the son; it was a contract for a valuable consideration, part of that consideration being marriage, for the parties to the intended marriage were parties to the deed, and the friends of the lady might well have refused their consent

* 128 to the marriage * unless an arrangement of this sort was made to secure payment of the father's debts, and a provision for the intended wife. Such a deed being once entered into cannot be revoked but by the consent of all concerned: *Davenport v. Bishopp*;¹ and after the execution of the other trusts of the deed the creditors are entitled to claim the execution of the trust in their favour. In *Ellison v. Ellison*,² Lord Eldon said that though a Court of equity would not constitute a party a *cestui que trust* so long as the stipulation rested in covenant only, it would do so when that stipulation, though voluntary, had been in part performed. *Bill v. Cureton*³ is, in truth, an authority for the respondents. There is just as much an actual trust created here as in that case. There an unmarried woman, not contemplating marriage at the moment, made a settlement on herself for life, and then on her possible husband and children. A bill was afterwards filed to revoke this settlement as purely voluntary, but, considering the nature of the interests, and the matter in respect of which the settlement was made, the Court held that it could not be revoked. So here, marriage was in contemplation and formed part of the consideration for the deed. That marriage has taken place, and the deed is irrevocable. In *Acton v. Woodgate*,⁴ the same principle had been applied by Sir J. Leech, Master of the Rolls; and even in *Garrard v. Lord Lauderdale*,⁵ Lord Lyndhurst takes a distinction between a mere voluntary arrangement to pay off debts, where the creditors are no parties to it, and a settlement which embraces other purposes, and creates trusts for effecting them. Here other purposes are embraced by the deed.

* 129 * A good consideration existed as between the parties to

¹ 2 Younge & C. Ch. 451.

⁴ 2 Mylne & K. 492.

² 6 Ves. 656.

⁵ 2 Russ. & M. 451.

³ 2 Mylne & K. 503.

the deed of 1818 for the stipulations into which they entered. One part of that consideration was a settlement as to the debts of the father, Francis Syngé; another was the marriage of his son. The respondent is mentioned as a creditor in the schedule to the deed, and is entitled to the benefit of it.

[LORD ST. LEONARDS. — That argument equally applies to one as to another person mentioned in the schedule attached to the deed. What do you say to a man filing a bill to carry into effect this disposition mentioned in the schedule, respecting a charity, "To family of the late James Stewart, an intended donation to fulfil a supposed intention of John Hatch, Esq., 1500*l*." ?]

The rights of this respondent, who is a *bonâ fide* creditor, cannot be prejudiced by what may affect the claims of other persons. It is not absolutely necessary that the creditor should sign a deed of this kind, if he is lawfully entitled to the advantages it gives, *Gregory v. Williams*,¹ *Field v. Lord Donoughmore*.² It is true that that decision of Lord Plunket was afterwards reversed by Lord Chancellor Sugden on a rehearing,³ but that reversal proceeded on the special circumstances under which the deed was sought to be enforced, circumstances which were only shown at the rehearing, and not upon any question of law. That case, therefore, must be taken as an authority for the present decision; *Acton v. Woodgate*⁴ shows that a communication to the creditor of the fact of such a deed having been executed may destroy the power of revocation contained in it, because, as the Master of the Rolls there observed: "The creditors being aware of such a trust, might be thereby induced to * a forbearance in respect of their claims * 130 which they would not otherwise have exercised." The truth of that remark appears forcibly to have struck the mind of Lord Chancellor Sugden, who in *Browne v. Cavendish*⁵ says, in reference to it: "When I first read that case, I made this observation in the margin, 'This has always been my opinion'; but in stating this I do not bind myself to hold that, in every case, a representation to a creditor will give him the benefit of the trust. It must depend on the character of the representation and the manner it is acted on. On the other hand, I should be sorry to have it understood that a man may create a trust for the benefit of

¹ 3 Mer. 582.

² 2 Mylne & K. 492.

³ 2 Drury & Wal. 630.

⁴ 1 Jones & Lat. 635.

⁵ 1 Drury & War. 227.

his creditors, communicate it to them, and obtain from them the benefit of their lying by until, perhaps, the legal right to sue was lost, and then insist that the trust was wholly within his own power." In *Kirwan v. Daniel*,¹ Vice-Chancellor Wigram adopted the same view of the subject. Here it is clear, on the terms of the settlement, that the trustees are directed to pay the interest on the debts, and subject thereto, and to the debts themselves, the property is limited in settlement. To this it is added that the debts mentioned in the schedule shall be charges on the trust lands, and the interest appears to have been for years paid by the son, and consequently this case falls within the description of those already mentioned.

[LORD ST. LEONARDS. — You cannot raise an equity on a communication of the deed to the creditor without having charged the communication in the bill. To do so would be to take the defendant by surprise. Now Lord Chancellor Brady states, in his judgment, that the bill alleges only the execution of the deed of 1818; but not that the trustees entered on the land or took a part in the execution of the trust, or that there was any communication * 181 * to Simpson, as a creditor, or that he was aware of the deed.]

The evidence here consists of the letters of Mr. Francis Synge, jun., the real appellant to Mr. Simpson, the respondent; so that there is no ground for saying that he can be taken by surprise. On this point the present case resembles that of *Fitzgerald v. Stewart*.² There a consignment of goods had been made from abroad, to answer an annuity. The consignee in this country gave a notice to the annuitant, and made payments in pursuance of it. He was held not to be entitled afterwards to discontinue such payments, so long as he had any produce of the consignments in his hands. In *Harland v. Binks*³ A. had executed a deed, assigning all his property in trust for his creditors who should come in and sign the deed. B., the assignee, who was not a creditor, took possession of the property. C., a creditor, applied to B. for an explanation, declared himself satisfied with it, and took no step in a hostile manner to enforce his demand, but did not actually sign the deed; four other creditors did the like; another creditor, treating the deed as void, issued an execution, and seized the property. The

¹ 5 Hare, 493.

² 15 Q. B. 713.

³ 2 Russ. & M. 457.

Court held that the deed was valid, for that, by what had taken place between B. and some of the creditors, the relation of trustee and *cestui que trust* had been created. In that case *Williams v. Everett*¹ was cited and adopted; for though there the decision was against the existence of the trust, it proceeded entirely on the ground that, from the first, the person sued had absolutely repudiated the trust; had he once accepted it, had the situation of the creditor been in any way altered, the *trustee could not *132 have retired, nor would the deed be revocable.² *Heap v. Tonge*³ is also a strong authority to show that where the consideration is valuable, and the interests of other parties are affected by the deed, it cannot be treated as a mere voluntary deed. There has been a course of dealing here which distinguishes this case from that of *Garrard v. Lord Lauderdale*, and fully warrants the decree of the Court below.

The Solicitor-General, in reply. — No notice whatever was given of the existence of the deed. John Synge paid interest on his father's debts, as a steward might have done, but not in consequence of the deed, or of any notice to the creditors that such a deed existed. The bill does not allege notice.

The rule at law is expressed in the case of *Williams v. Everett*,⁴ that the adoption by the trustee of the trust, as such, must be shown, and is distinctly recognised in *Harland v. Binks*,⁵ the decision in which proceeded on the express fact that there had been such an adoption; the question of the creation of the relation of trustee and *cestui que trust* being treated as one of fact rather than one of law.

There was no such adoption here, nor any need of any such trust, so far as this respondent was concerned. Being a bond creditor, he might have gone in under the administration suit, which was instituted against John, on account of his own debts, and of those of his father, of whom he was the personal representative.

* THE LORD CHANCELLOR, having stated the facts and *133

¹ 14 East, 582. See *Lilly v. Hays*, 2 Harris. & W. 338, 5 A. & E. 548.

² Per Mr. Justice Wightman, *Harland v. Binks*, 15 Q. B. 721.

³ 9 Hare, 90.

⁵ 15 Q. B. 713.

⁴ 14 East, 582.

pleadings, said: The question now presented for consideration is, what were the rights of Mr. Simpson, the bonds, of which he is the holder, as representing the original obligee, being included in this schedule? The Court of Chancery decided that the deed gave to Mr. Simpson an equitable right, as having an encumbrance or a charge upon the land of Kilberry, and the other lands so conveyed to trustees, and made a decree upon the footing of his having that right. One of the defendants, Mr. Synnot, whom I may treat merely as a judgment encumbrancer, claiming under John Synge, appeals against that decree, upon the ground that that deed gave no right whatever to Mr. Simpson as a bond creditor, or at least no right which entitled him to come and claim relief against the estate.

I do not at all question or doubt the doctrine acted on in the cases of *Garrard v. Lord Lauderdale*,¹ and *Walwyn v. Coutts*,² and other cases which have followed those decisions. They proceeded on the principle that, where a person who is indebted makes provision for payment of his debts by vesting property in trustees for the purpose of discharging them, but does so behind the backs of the creditors, and without communicating with them, the trustees do not become trustees for the creditors. The arrangement is one supposed to be made by the debtor for his own convenience only; it is as if he had put a sum of money into the hands of an agent, with directions to apply it in paying certain specified debts. In such a case there is no privity between the agent and the creditor. The debtor may at any time revoke

the authority given to his agent, and may recall the money *134 placed in his hands. The *agent is the agent exclusively of the debtor, not of the creditor. No action could be maintained against him by the creditor; there is no privity between them. The same principle precisely applies where the debtor, instead of placing money in the hands of another, with directions to apply it in discharge of his debts, conveys real estate to him in order to its being converted into money by sale or mortgage, so that the money raised may be applied in discharge of debts. The person in whom real estate is so vested is a trustee, not for the creditor, but for the debtor. When, in pursuance of his trust, the trustee sells, and pays the debtor his demand, he does so in pursuance of the directions given to him by his prin-

¹ 3 Sim. 1, 2 Russ. & M. 451.

² 3 Sim. 14, 3 Mer. 707.

cipal, the debtor, from whom he has received the property, not in discharge of any duty which he owes to the creditor; the debtor is alone the person to whom the trustee is to look. The debtor may regulate the disposition of the property as he thinks fit; may order the proceeds of it to be applied in discharge of his debts, and may then revoke these orders, and give fresh directions, without regard to the interests of those for whose benefit the prior orders would have operated.

It would be idle and worse than idle to go through, at any length, the authorities upon this subject. They were all cited at the bar, but the doctrine is too well established to need illustration. I shall only advert to two cases in which the doctrine is very clearly laid down, and was acted upon by my noble and learned friend the then Lord Chancellor of Ireland; I allude to the cases of *Evans* or *Law v. Bagwell*¹ and *Browne v. Cavendish*,² the first in 1843, and the second in 1844. In the first case a person of the name of John Bagwell was indebted to George Putland * in the sum of 2000*l*. (it is unnecessary to state how that *135 arose), in respect of an estate which Putland had agreed to purchase, and on the proposed purchase of which he had advanced 2000*l*., but the sale went off. Putland, of course, had a lien upon that estate, and Bagwell, being thus indebted to him, conveyed another estate, not that upon which Putland had a lien, to two trustees in trust to pay the debts mentioned in the schedule, which included Putland's 2000*l*. Putland died, and his representative finding that he was named in the schedule, filed a bill to have that sum of 2000*l*. paid to him under the trusts of that deed. But the Lord Chancellor held at once that there was no doubt upon the question, and that the plaintiff, not being a party to the deed, could not maintain a bill for the performance of the trusts, and therefore treated it as a case that came exactly within the principle of *Garrard v. Lord Lauderdale*,³ and several other cases.

*Browne v. Cavendish*⁴ went really upon the same principle, though it appeared, perhaps, to go a little further. In that case certain lands were conveyed, called the lands of Merton, to trustees, to sell and pay off a number of scheduled debts of John Browne, the surplus to John Browne in fee. Amongst the debts

¹ 4 Drury & War. 398, 2 Con. & Laws, 612.

³ 3 Sim. 1, 2 Russ. & M. 451.

² 1 Jones & Lat. 606.

⁴ 1 Jones & Lat. 606.

in the schedule was a bond due to other persons of the name of Browne. The property having been put up for sale, Cavendish, the defendant, purchased it, and there having been some question as to the extent of the debt due to Browne upon the bonds, it was arranged between Cavendish, the purchaser, and the vendors, that Cavendish should retain in his hands 1000*l.* of the purchase money,

for the purpose of satisfying that demand; he did retain * 136 the 1000*l.*, but * afterwards, by an arrangement between him and the vendor, handed it all over to him; and then the Brownes, the creditors, filed their bill claiming to be entitled. The same principle was held to apply as in the former case, the only distinction being that the purchaser had retained for a time the money in his hands, in order to satisfy the debt. The Lord Chancellor held that that made no difference; that it was still a mere arrangement, to which the creditor was no party, and consequently the bill would not lie.

Those two cases seem clearly to illustrate a principle which needs no further illustration. The doctrine was carried very much further in the case adverted to by my noble and learned friend, before the Vice-Chancellor, of *Gibbs v. Glamis*,¹ and afterwards before the Lord Chancellor as *Gibbs v. Gibbon*,² and by the case which followed it in the Court in Ireland, of *Simmonds v. Palles*.³ First of all, the Lord Chancellor of England held, in *Gibbs v. Gibbon*, that the same principle applied, although there did undoubtedly seem to be a distinction. In that case there were certain persons who appeared in Court as adverse claimants of a fund of 4000*l.* or 5000*l.* Amongst the claimants was a gentleman of the name of Hele. A bill had been filed upon the subject, and Gibbs had been made a party improperly, at least he had no interest in that suit. The parties who were claiming that fund wanted to divide it amongst themselves, and they concurred in assigning the fund to a gentleman of the name of Gibbon upon trust, first of all to pay the trusts of the deed, and of the transaction itself, and to pay the costs that were due from Hele to Gibbs. Secondly, * 137 to pay a certain sum to Hele, * and another sum to the other claimants, and to pay the residue to Lady Glamis. After that transaction had taken place Hele died. I suppose he must have died insolvent, for Gibbs then filed a bill in order to

¹ 11 Sim. 584.

² 2 Jones & Lat. 489.

³ 11 Sim. 591, 5 Jur. 378.

have that trust executed, so that he might obtain the costs due to him, and the Vice-Chancellor thought he was entitled. It was taken by way of appeal to Lord Cottenham, upon the ground that there was no substantial distinction between that case and the others to which I have adverted, and many others that went upon the same principle. So Lord Cottenham held, for he held that although Gibbs was actually named as the party to whom those costs were to be paid, it was only one mode of expressing that Hele was to have what was due to him, and also the costs due to Gibbs; that the circumstance of Gibbs being named in it made no difference, and that therefore he had no right to institute such a suit. That seemed a strong case, because the result was that though Lady Glamis by the terms of the deed was to take the residue, but not until after paying the costs, there were no means, at least at the suit of Gibbs, of claiming as against her the amount of those costs. But the truth was, that applying the same principle, the only person who could have insisted upon that trust being performed was Hele's executor, it being a trust to pay to Gibbs that debt of Hele, and the trust was held to be a trust for Hele's benefit, and not for the benefit of Gibbs.

That case was followed by my noble and learned friend, in the case of *Simmonds v. Palles*.¹ I do not know that it is necessary to state the particulars of that case; there is a good deal of complication in it, but the short way of stating it appears to me to be this: two persons, of the name of Triston and Hardy, brought two actions, in which *Simmonds was their attor- *138 ney, one against two persons of the name of Goold, and the other against only one of those persons. While that action was pending the defendant agreed to pay to, and the plaintiffs Triston and Hardy agreed to accept, in liquidation of their demand, 1000*l.*, together with the costs as between attorney and client. The defendant Palles was indebted to some members of his own family, and he, by arrangement with them, mortgaged an estate of his own to Triston and Hardy, or rather to Hardy, in trust for Triston and Hardy; first, to secure 1000*l.*; and secondly, to secure to Simmonds the costs of the action as between attorney and client, and then to secure certain other expenses. Simmonds was no party to the arrangement, but afterwards filed his bill to enforce it. Just upon the same principle upon which that case

¹ 2 Jones & Lat. 489.

of *Gibbs v. Gibbon* had been decided, the Lord Chancellor held that Simmonds had no title to institute such a suit.

I began by saying that I did not at all question the case of *Garrard v. Lord Lauderdale*, and the other cases, neither have I the least doubt of the propriety of those decisions. I say that with the more confidence, because I collect from the language of my noble and learned friend that he decided as he did in deference to what had gone before, though he rather doubted whether those cases had not gone too far. I confess I think that the principle being once established, it follows as a necessary consequence that those decisions were perfectly correct.

The case is, however, obviously different when the creditor is a party to the arrangement; the presumption then is that the deed was intended to create a trust in his favour, which he therefore is entitled to call on the trustee to execute. So even though he be not made a party, if the debtor has notice given him of the existence of the deed, and has expressly or impliedly told him

* 139 that he may look * to the trust property for payment of his demand, the creditor may thereby become a *cestui que trust* and may acquire a right as such, just as if he had been a party and had executed the deed. It was argued that in this case the facts afford irresistible evidence that the existence of the deed must have been made known to the creditor, and that he must be taken to have abstained from enforcing his bonds by action or otherwise, relying upon the security afforded by the trust in his favour. The appellants deny that this is a just inference from the evidence, but, even if it is so, they say that no such case is made on the pleadings. I do not think it necessary to go into this question, being of opinion that the respondent's title as a *cestui que trust* is good, independently of all considerations arising from notice and conduct. I think the circumstances show here that the schedule creditors were objects of the settlor's bounty just as much as John, the son, who took the estate subject to the debts. It may be that the trust for payment of the debts of Francis Synge was during his life a trust which he might vary or revoke at his pleasure: I think it was; still, when such revocation became by his death impossible, I think that John, his son, could only take the estate as it was given to him, that is, subject to the scheduled debts, which according to the expressed provision of the deed were to be liens and charges thereon.

I come to this conclusion on the following grounds : the trust in question was not to come into operation until after the death of Francis Synge, the settlor. Among the sums mentioned in the schedules and directed by the settlement to become liens and charges on the lands in question, is a sum of 1500*l.* described as an intended donation to the family of the late James Stewart. Now so far as relates to this sum there could be no claim, except by virtue of the deed ; it was a mere gratuity or intended gratuity. *The settlor certainly meant that it should be *140 paid, and unless the settlor is to be considered as having conferred on the members of Stewart's family a right to treat themselves as *cestuis que trust* having a valid claim against the lands, the benefit which he intended them to have could never be obtained by them.

But further, the first item in the schedule is thus described. "To Miss Elizabeth Synge, by notes, bonds, or balance of accounts, due to her by the late John Hatch and Francis Synge, Esq., about 5500*l.*" The almost irresistible inference from this language is, that a portion at least of that sum of 5500*l.* consisted of simple contract debts, as to which therefore the creditor in the then state of the law could have no right against the real estate independently of the deed. In such a case, as well as in that of the intended donation to the family of James Stewart, the provision would be altogether inoperative, unless it is understood as having been intended to be a benefit to the creditor, as having been introduced for the purpose of giving her a security which she did not previously enjoy. For it certainly did not, in favour of the executor, make the debt a charge on the real in exoneration of the personal estate, so that if the creditor did not acquire a right to enforce the execution of the trust, no one ever could do so.

I rather think that these remarks may apply to some of the other items of the schedule besides those which I have particularly mentioned ; but I do not think it necessary to inquire further, because I feel satisfied that the intention must have been the same as to all the persons named in that schedule: it could not be that the settlor intended the trust to operate by way of bounty as to some of them, and not as to all.

I have pointed out these special circumstances as affording to my mind satisfactory reasons in favour of the construction

*put on this deed by the Court below ; but I do not *141

wish to be taken as binding myself to say that even if no such specialties had existed I should have come to a different conclusion.

I doubt whether the doctrine acted on in *Garrard v. Lord Lauderdale*,¹ and in the other authorities which I have adverted to, applies to a case where the trust is to come into operation only on the death of its author, and where, subject to the trust for payment of debts, the lands charged are conveyed by way of bounty to a third person. I think it at all events open to argument that in such a case the settlor must *primâ facie* be understood to be dealing with his property as if he was disposing of it by will, and therefore as contemplating bounty throughout; or if it be contract, so far as the party taking the estate is concerned, I think it must still be construed as bounty in favour of the plaintiffs named as encumbrancers. This must of course be in each case a question of construction. I advert to this point only to guard against being misunderstood.

It remains only that I should notice an argument pressed at the bar by the counsel for the appellants, derived from the proviso occurring late in the deed, and authorising the trustees, with the consent of Francis Synge and John Synge, to sell any part of the property in question for the payment of the debts. This it was urged is inconsistent with the existence of a trust for payment of debts; for if such a trust existed there would have been a clear right on the part of the creditors to compel a sale, even without the consent of Francis and John Synge; there is, however, no such inconsistency. The sale contemplated by the proviso is a sale in the lifetime of Francis Synge before the trust for the

* 142 scheduled creditors had arisen, and when * the lands in question were, by virtue of the one hundred years' term, subject to trusts in favour of John Synge and Isabella, his intended wife. It is certain, therefore, that no sale could then take place under the prior trust in favour of the creditors, and the proviso relied on was introduced for the purpose, if Francis and John Synge desired it, of enabling the trustees to sell in spite of those prior trusts.

On the whole, therefore, I think that the view taken by the Court below was correct. I need only say that I have come to this conclusion with very considerable diffidence, knowing that I have not the concurrence of my noble and learned friend; but

¹ 3 Sim. 1, 2 Russ. & M. 451.

upon the whole, I think the judgment of the Court below ought to be affirmed.

LORD ST. LEONARDS. — My Lords, I have never been in the habit of lightly differing from others, or raising questions, when I have taken the liberty of tendering my opinions to your Lordships. Finding at the close of this argument that my noble and learned friend and myself did not agree, I at once wrote my view of the question, and I communicated that writing to my noble and learned friend, on whom I regret to find that it did not make a very favourable impression. I will now read what I wrote immediately after the argument.

A clear trust was raised by the settlement of 1818 for keeping down the interest on the debts in the schedule ; subject to that trust the estate was settled (subject, under a term of one hundred years, to a trust for indemnifying an estate called Glasnamullen, belonging to John, against debts and encumbrances of Francis), upon Francis for life, with remainder to John absolutely, and it was provided that this estate should continue charged with the payment of all the debts and encumbrances of Francis, specified in the schedule, — * (I may just notice in passing, that it is a * 143 little doubtful whether this includes all the charges, or only the charges specified in the schedule), — which are to remain charges thereon exclusively, and in exoneration of Glover's Alley and York Street property. And it was further provided that this estate might be sold in Francis's lifetime for the payment of all or any of the debts then charged on any of the estates conveyed or assigned with the consent of Francis and John, or the survivor. I will here add an observation, that that power only affected the encumbrances which were charged, and therefore was limited in that respect. We find the debts in the schedule to include debts due from the late Mr. Hatch and Francis, and separate debts of each, and an intended donation of 1500*l.* to fulfil a supposed intention of Mr. Hatch, and two annuities probably to servants ; but how granted, or by whom, does not appear.

The first question to be considered is, could any of the creditors or other persons (for all were not creditors) have filed a bill immediately after the execution of this deed for the payment of the interest of their debts and claims ? (of course the intended donation of 1500*l.* could not have been enforced,) but could the real

creditors of Hatch and Francis, or either of them, have filed such a bill? The authorities clearly show that they could not, for they were no parties to the deed; no contract was entered into with them, no rights or remedies of theirs were prejudiced by the deed. Francis and John might at any time have revoked the trust for the creditors, for as they created so they could defeat the trust, and it did not follow that the creditors would ever have acquired a knowledge of either the trust or its revocation. This shows how wholly unaffected the creditors were by the transactions of 1818.

* 144 * There were two deeds executed subsequently to the deed of 1818, the operation of which I must now consider. The first was a deed of 1824, between Francis and John. Francis conveyed his life estate in part of the settled property (including part of the property which had been made a security for the debts in the schedule to the deed of 1818) to John and another person to pay the annuities and interest of the sums of money and debts mentioned in the schedule (which included all the debts mentioned in the schedule to the deed of 1818), during Francis's life, and subject thereto, for Francis for his life. The schedule to this deed of 1824 contains the former debts, and also other debts to the amount of 15,433*l.*, a sum exceeding the aggregate amount of the other debts. It could hardly be contended that this deed gave to the new creditors of Francis any right to sue, and as to the old creditors, Francis, with the assent of John, was really usurping upon their supposed rights; for if the trust in the deed of 1818 was binding, and could not be revoked, Francis and John could not place any new debt on a par with the old, although this they assumed to do; and in my opinion they had power to make the additional charge.

The other deed is the settlement of 1832, on John's second marriage, after the death of his father and of his first wife. This was said to be a confirmation, because it recites the settlement of 1818, but there is nothing on the face of the deed of 1832 either to confirm or to impeach the settlement of 1818. The settlement was, of course, operative, and John accordingly refers to it, and conveys his interest under it.

If the creditors could not have maintained a suit immediately after the execution of the deed of 1818, did any such right accrue to them at a later period? It was insisted upon for the

* 145 respondent, that after Francis's death, * at all events, the

trust could not be revoked by John, and this appears to have been the opinion of the learned Lord Chancellor of Ireland; and further, even if the trust standing by itself could have been revoked, yet that that acknowledgment of it by the creditors, and the acting under it, rendered the trust no longer revocable, and therefore it might be enforced by the creditors.

It does not appear to me that the death of John varied the case. The question is not whether the trust can be enforced as between the parties, but whether the creditors can enforce it. It is a consequence of the trust not being binding on the parties who created it, that they may revoke it. It does not at all follow, where a trust is created for creditors by two persons, that the survivor may, after the death of his co-owner, revoke the trust to the injury of the estate of the latter. But does this circumstance give a right to the creditors which up to that moment they did not possess? If the trust was originally one of which, though they might reap the benefit, they could not enforce the execution, how can any shifting right of the owners, as between themselves, give to the creditors a claim which, under the contract as it stood originally, the law denied to them?

It is almost pedantry to go through cases. The clear principle is, that a trust created for creditors without bargain or communication with them cannot be enforced by them; the case is altogether distinguishable from voluntary settlements, but as I have, in former cases before me, very fully stated my view on this point, I shall not repeat what is already in print. The cases of *Walwyn v. Coutts*,¹ and *Garrard v. Lord Lauderdale*,² show the continuing powers of the authors of such a trust as this, notwithstanding the creation of the trust, and in the latter case the * Duke * 146 of York's trustees resisted the demand after the Duke's death, so that the death of the single author of such a trust does not give the creditor a right to sue.

The case of *Gibbs v. Glamis*,³ which I have several times had occasion to refer to in deciding cases of this nature, shows that although a trust is expressly created in favour of a third person for the mutual benefit of all parties entitled to a fund, and one party is only to take the residue after payments of the costs, and the trusts have not been defeated, yet that any one of the persons

¹ 3 Sim. 14, 3 Mer. 707.

² 11 Sim. 584-591.

³ 3 Sim. 1, 2 Russ. & M. 451.

creating the trust may object to the payment of the costs to the person for whom they were provided, and the latter cannot file a bill for the execution of the trust. This proves that although it is the common interest of several parties that a trust created by all of them for a creditor, not a party to the arrangement, shall be duly performed, yet the creditor cannot enforce it.

I may, perhaps, be excused, as it will save some trouble, for reading what I stated in the case of *Simmonds v. Palles*,¹ although, no doubt, it is unusual to read what has fallen from one's self. The observations which I there made, after referring to the case of *Garrard v. Lord Lauderdale*, were these: "It was settled before that case, that if a man, without communication with his creditors, make a provision for paying them, for which they have not bargained, he may, before the execution of the trusts, destroy them. The questions in that case were, whether, under the circumstances, the Duke of York had exercised that power, and whether it was competent for him to do so? Without going through the cases, I will refer to *Gibbs v. Glamis*,² a remarkable

case, one upon which learned persons differed; for the decree of the Vice-Chancellor * was reversed by the Chancellor

and I am not satisfied that some learned persons would not prefer the first decision. That case was of this nature: a Mr. Hele, claiming to be interested in a sum of 4000*l.*, filed a bill in respect of it. Gibbs, the plaintiff, was, I suppose, properly a defendant in that suit. There was a contest as to who was entitled to the 4000*l.*, and the several claimants came to an agreement between themselves that they would divide the money amongst them in certain proportions, and that all the costs of the suit should be provided for, and in particular Gibbs's costs; and without any communication with him they assigned the 4000*l.* to trustees, in trust, first to pay the costs and expenses of all parties to the deed, in or about the suit of *Hele v. Fernie*, or of the deed or otherwise, relating to their claims on the 4000*l.*, as between solicitor and client; and also the costs of Gibbs, and other costs; and then to pay 800*l.* to Hibbert, 1800*l.* to Hele, and the residue to Lady Glamis; so that Lady Glamis had no right to receive any thing until after payment of the costs to Gibbs. There was as express a trust to pay Gibbs his costs as to pay Lady Glamis the residue. The trustees received the money, and paid the other persons named in

¹ 2 Jones & Lat. 505, 506.

² 11 Sim. 584.

the deed, and were willing to pay Gibbs, when Lady Glamis objected that he was not entitled to be paid out of that fund. The Vice-Chancellor held that the several parties to the deed had a common interest in the payment of Gibbs's costs out of the fund ; that the agreement had only been entered into on the condition that payment of Gibbs's costs would be provided for out of the fund ; and, therefore, that the case was not within the authorities, and he sustained the bill ; but the Lord Chancellor reversed that decree, and that reversal appears to have been submitted to. He said in his judgment,¹ * that Hele was liable to pay the *148 plaintiff, Gibbs, his costs, and in order to protect him against the consequences of that liability, the parties provided, incidentally, that the plaintiff's costs should be paid out of the fund ; that the question then was, whether that provision gave the party whose costs were to be so provided for, a right to institute a suit as a *cestui que trust*, he having no interest in the fund, not having been a party to the arrangement, and the agreement having been made between the parties interested in the fund, for their own benefit or convenience ; and that the case was not distinguishable from *Garrard v. Lord Lauderdale*, and the other cases which had been cited ; and he added, that the objection was one which was open to all the defendants, and that it was immaterial what interest the party who made the objection had.

The paper which I wrote goes on to say : Like the case of *Worrall v. Harford*,² where the attorney could not recover his costs under the trusts, it was not that the trusts did not provide for them, or that they were not to be paid, but simply that the attorney was not a *cestui que trust* under the trust for payment of them. In such a case, of course, it is wholly immaterial that the trust cannot be revoked, or that any of the authors of the trust are dead ; for the trust remains capable of execution, and may be enforced, but not by the attorney.

I do not place any reliance upon the cases before me, in Ireland. I unwillingly followed the principle ; but although I believe, in one of the cases, *Browne v. Cavendish*,³ an appeal was lodged in this House, yet it was withdrawn ; at all events the decisions were acquiesced in.

It still remains to consider the alleged case of acknowledgment

¹ 11 Sim. 591.

² 1 Jones & Lat. 606.

³ 8 Ves. 4.

of the right of the creditors by the Synges. Now, as was
 *149 observed by Lord Chancellor Brady, no * such case is made
 by the bill ; and there is nothing in the answer which can
 be made use of against the appellant. The evidence therefore
 was not properly receivable ; but this is not material, for upon
 examining the evidence it proves no such case. It does not ap-
 pear that the creditors ever saw the deed, and certainly no repre-
 sentations were made in regard to any security provided for them.
 It is therefore the naked case of payment, by the several persons
 in succession, of interest on the debts ; and to this they might be
 liable in various characters ; but however that may be, the pay-
 ment of interest by the parties would not give a right to the cred-
 itors to sue the trustees ; nor, indeed, does it appear how far the
 trustees acted in the trusts. The cases of *Garrard v. Lord Lau-*
derdale,¹ and *La Touche v. Lord Lucan*,² show that some distinct
 act of dealing with the creditors must take place, in order to entitle
 the latter to enforce the trusts.

Upon the whole, therefore, I submit to your Lordships that this
 question is settled by the authorities, and that therefore the bill
 should be dismissed with costs, so far as it sought to have the
 benefit of the trusts of the deed of 1818, and remit the case to the
 Court of Chancery in Ireland, to do therein as shall be just, and in
 conformity with your Lordships' judgment.

I need not say, after the opinion which has been delivered by
 my noble and learned friend, that there will be no such conse-
 quence of this appeal, because, as we are divided in opinion, the
 decision will, as a matter of course, be affirmed ; but I thought it
 would be right to read what I had written, that it may be known
 to the profession what the effect of this decision is. I very much
 fear that it will entirely unsettle the law upon this sub-
 *150 ject. The law upon this * subject is perfectly well known
 at present, and although I followed the decisions very reluc-
 tantly, yet they proceed upon a principle which, being carried out,
 every man can understand. Now, I believe it will be found ex-
 ceedingly difficult to understand, in any complicated case, whether
 the rule does apply or not. I was very glad to hear my noble and
 learned friend say that he did not dispute any of the cases, because,
 that being so, this decision must be considered as standing by
 itself, and does not overrule the former authorities. In point of

¹ 3 Sim. 1, 2 Russ. & M. 451.

² 7 Clark & F. 772.

fact, but for that statement I should have considered this decision by your Lordships' House as overruling the case before Lord Cottenham, and clearly as overruling the case before me, in Ireland, of *Simmonds v. Palles*,¹ in which I followed that decision of Lord Cottenham, because that was almost as strong as the case of *Gibbs v. Lady Glamis*.² I do not know where we are to stop if we are not to follow the case of Lady Glamis. If we are to say that that is not law, and to reverse it, which this House may certainly do, that I understand; and then it would come to this, that where there are several parties who have a common interest in a trust which they have created for the benefit of a person who is not a party to the deed, and has no abstract right to claim the benefit of the arrangement, yet, the several parties being interested in it, any one party by whom it was created may have the benefit of it, in order indirectly to give to all the parties who created the trust the benefit of the arrangement. But I understood my noble and learned friend to put this case upon two grounds: first of all, that the trust was not to come into execution until after the death of Francis Synge; next, that this was a bounty. I wish that I could concur in that view; I confess I cannot. In the first place, as to the fact. I do not apprehend * that the fact is that this trust was not to come into * 151 execution until the death of Francis Synge. The first trust was for the payment of the interest of debts due during the life of Francis Synge; the trust therefore began immediately. Francis Synge was then alive. Supposing the capital not to be paid till after his death, what then? Both principal and interest were secured, the interest during the life, the principal after the death. If the creditors could not claim interest during the life of Francis Synge, I think it is utterly impossible, in point of law, to hold that they could claim the benefit of the principal after his death. Observe what the difficulty is; and that is the one great ground upon which these cases have proceeded. If you are providing for trustees' costs, and if you are providing for creditors incidentally, and with a view to your own arrangements, without any communication with the creditors, without even their knowledge of the instrument, the knowledge of which may never reach them, can any thing be more inconvenient than that a creditor whose right you have not touched, an attorney who is employed by the

¹ 2 Jones & Lat. 489.² 11 Sim. 584 - 591.

trustees, and who may know nothing of the trust, should be enabled to file a bill, and bring anybody at once before a Court, and claim the execution of the trust *in invitum*? Suppose that, in this particular case, the decision of the Court below was right, I think it is utterly impossible to deny that the creditors might have filed a bill immediately after the execution of the deed. Could that be prevented? What was there to prevent it? Was not the trust just as operative for the payment of the interest as it was for the payment of the principal? Was not there a general charge upon the estate, independently of the trusts created for the payment of the interest during Francis's lifetime, a charge of the corpus of the debt generally, without restriction? What was the operation of that? * To give to all those parties who were *cestuis que trusts* an absolute lien, an equitable mortgage, the right to enforce the trust for payment of their capital as well as the interest. Then they might file a bill, beyond all question. Is that within the authorities? I cannot persuade myself that it is. I think, in order to say that it is, you must overrule the case before Lord Cottenham, and certainly the last case before me in Ireland, to which I can have no possible objection, if the law is put upon the right footing. Of course, my anxiety is that the law should be perfectly settled and understood; but the effect of this decision will be, in my mind, to overrule all those cases.

Then it is said by my noble and learned friend that this is a bounty. It would give me great pleasure to agree with him on this subject, but I cannot. In the first place it clearly could not be enforced. If it could, how could the parties to the deed, after they had created the trust as it is called, for a sum under 14,000*l.*, create by another deed and out of the same property, without the concurrence of any of the creditors entitled to the prior charge, another trust for other creditors, placing them *pari passu* with the first creditors, for a sum exceeding the amount of the first debts? It passes my conception to understand that: it was a trust they could not create. They do not make the second subject to the former trust, but they make a common trust of former debts, and of all the additional debts which have been incurred by Francis, and that therefore shows what their intention was. But if it was a bounty as to any one, I do not think it can be said (I do not understand my noble and learned friend to have said so) that

it was a bounty between the present settlers, because this settlement was for a valuable consideration. There were a great many arrangements upon this settlement; it was of course the foundation of the marriage * settlement; it was not a * 153 bounty in any respect; it was a contract, the parties to which took the property, beyond all doubt. The only question is, whether the creditors who were no parties to it, suppose it to be a bounty, could enforce it? Let us look a little at the consequence; let anybody read through that bill and read the number of encumbrances. Francis went on making encumbrances, so did John to a very great amount indeed. Read through the bill which was filed in the Court of Chancery in Ireland, and see the number of persons who were necessary parties to that suit. Can anybody imagine that the settlement of 1818 contemplated involving the parties to that arrangement, and their descendants, in the expenses which would be incurred in such a suit, bearing always in mind that it is not a question whether the trust is to be executed or not? That is not the question; but the simple and only question is, whether it is a trust which can be enforced by the creditors? That parties having adverse rights or mutual rights can enforce the trust, nobody doubts. Take the case before Lord Eldon of the trustees. In that case there was a proviso that the trustees should pay all the costs occasioned in the execution of their trust. The attorney who was employed by the trustees filed a bill, saying that he was a *cestui que trust*; his costs no doubt were provided for by the deed, but Lord Eldon held, and properly held, that he had no rights as a *cestui que trust*; his demand was against the trustees, and the trustees' remedy was upon their trust fund. It is a convenient decision, and I think a very just decision; it enables the parties to make arrangements for paying claims which may afterwards arise as between themselves, for in this particular case, for example, it does not follow when the claim is to arise. The claim might and probably would arise after the death of every party to the deed. The death of the settlor, therefore, * does not seem to be so very material. It is * 154 quite clear that any costs occasioned after the death of every party to the deed might and would be obtainable by the trustees under the trusts of the deed; yet, though the attorney, a *quasi* creditor, certainly has a right, as a creditor of the trustees, which trustees are to be paid out of the fund, he has not as such

creditor a right to come into a Court of equity and ask for the execution of the trust.

I very much regret that I cannot concur with my noble and learned friend. I hope that this decision may not have the effect I fear of unsettling, in a great measure, that which I have, up to this time, considered to be the settled rule of law. I am very glad to have heard my noble and learned friend state that he does not find fault with any of the decisions; that, I hope, will be considered to place this case as a decision of the House, only upon the special circumstances, and the authorities therefore will be considered to remain, as they ought to remain, untouched, and the law settled. The result here, of course, will be that the decision in the Court below will be affirmed.

LORD CHANCELLOR. — Of course there will be no costs.

Decree affirmed.

Lords' Journals, June 30, 1854.

1854. July 6, 7, 10, 14.

THOMAS MOSTYN, *Appellant*.

ROBERT JOHN MOSTYN, *Respondent*.¹

Will. Mistake in Name of Legatee.

A testatrix, who, without professional assistance, made her own will, named Robert John M. (the eldest son of her brother) her executor. She then created two annuities, of 50*l.* each, in favour of two persons, and made a gift to a third, but in terms which left it doubtful whether the gift was of that specific sum, or of an annuity to that amount; she then proceeded thus: "My dear nephew, John Henry M. of H., surgeon, but late of Calcott Hall, the above bequests to fall into his hands and should he not marry to be divided equally between Samuel M., John M., and Mary D." (formerly Mary Margaret M., but then a married woman), "all of them late of Calcott Hall, must receive each 50*l.*, the residue to fall into my above-named executor's hands." There was a son, Thomas, born between Samuel and Mary, but there was no son named only John; the second nephew, John Henry, died unmarried; the others survived him.

¹ Drake v. Drake, 8 H. L. Cas. 176.

Held, affirming a decision of the Master of the Rolls, and of Lord Justice Turner (Lord Justice Knight Bruce having dissented), that Thomas was not entitled to any share of the residue.

BARBARA SHELDON, by a will, written entirely by herself, dated 24th November, 1824, but not executed till 2d December, in that year, devised, among other things, as follows: "I direct all my just debts, being made as moderate as possible, by my nephew, Robert Mostyn, of Calcott Hall, North Wales, Flintshire, who I here nominate my executor, who will of course be liable to the following bequests. I leave to my cousin, Mr. Thomas Lemon, the sum of fifty pounds a year for his life, and also the same sum of fifty pounds a year to his sister, Mary Lemon, for her life. I also bequeath to my dear, long-trying friend, Margaret English, — when I look back, and recollect the number of years that she has expended more than that sum of fifty pounds upon me, her unworthy friend, I feel ashamed in now, yes, in now writing so shabby a sum. *The above Margaret English now re- *156 sides at St. John's Green, Colchester, Essex. My property in this house to be taken as marked out. My dear nephew, John Henry Mostyn, of Holywell, surgeon, but late of Calcott Hall, Flintshire, North Wales, the above bequests to fall into his hands; and should he not marry, to be divided equally between Samuel Mostyn, John Mostyn, and Mary Davies, all of them late of Calcott Hall, must receive each fifty pounds; the residue to fall into my above-named executor's hands." The testatrix died on the 6th December, 1824.

A brother of the testatrix, named Samuel Mostyn, had formerly lived at Calcott Hall, but he died in her lifetime. He left five children, Robert John Mostyn, John Henry Mostyn, Samuel John-son Mostyn, Thomas Mostyn, and Mary Margaret Mostyn (Mrs. Davies); but there never was a son named only John. The younger children resided at Calcott Hall till the death of their father, when Robert John Mostyn, the eldest son, took possession of the house; the others then went to reside elsewhere. The will was proved in March, 1825, by Robert John Mostyn.

John Henry Mostyn died in 1835, unmarried.

Of the three persons alleged to be annuitants, Margaret English died in 1828 and Thomas Lemon in 1844. Mary Lemon still survived.

On the 20th October, 1852, Thomas Mostyn filed his claim in

Chancery against Robert Henry Mostyn, for two undivided third shares of the residue of the estate of Mary Sheldon, contending that Margaret English, as well as Thomas Lemon, was an annuitant of 50*l.*, and not a mere legatee of a sum of money to that amount; and that on the death of each of these annuitants the capital fund required to produce the annuity became vested, as residue, in the three persons who were to take on the death of

John Henry Mostyn unmarried; and he further contended

*157 that *he was one of those persons, although erroneously named in the will as John Mostyn.

The claim came on for hearing before the Master of the Rolls, on the 14th of February, 1853, when it was ordered to be dismissed, but without costs. The case was taken before the Lords Justices Knight Bruce and Turner, who were divided in opinion; and so the judgment in the Court below stood affirmed.¹ The present appeal was then brought to this House.

Mr. Anderson and *Mr. W. R. A. Boyle* for the appellant. — The testatrix has here made a mistake in the Christian name of the appellant; but the whole context of the will shows that she intended to benefit him. John Henry is the only person whose name is correctly given in the will. He was the favourite object of the testatrix's bounty; but if he died unmarried, she meant that the property should go to the younger nephews and the niece. Robert was provided for by his father's fortune; the others were not, and therefore were naturally objects of her bounty, next after her favourite, John Henry. At the time of the date of the will, and of the death of the testatrix, the eldest son, Robert John, actually resided at Calcott Hall; the others had quitted it; and she describes them as "late of Calcott Hall." That is a material fact, and affords a clear and undoubted key to the intention of the testatrix. Another important fact is, that the sons are duly named in their order of seniority; and the mistake as to the name of one of them becomes therefore entirely immaterial. John Henry could not be intended to take this particular interest, for, in the first place, she knew how to name, and had already named

*158 him, correctly; and in the next to give him, *first of all, the whole fund, and then to declare that if he should not marry, he is only to be entitled to a portion of it, is to make an

¹ 3 De G., M. & G. 140.

absurd devise ; for whether he married or not could not be known till his death. The testatrix really meant that he should have the whole fund, but that if he died unmarried, by which she meant without children, it should go to his younger brothers and sisters ; and she has simply made a mistake in naming one of those brothers, as she did in naming Robert himself.

Under these circumstances, the principle of construction derived from the decided cases is clearly in favour of the appellant. They are collected in Jarman on Wills.¹ *Dent v. Pepys*² shows that the context of a will may correct a mistake in a name used in it. *Pitcairne v. Brase*³ is to the same effect, and so are *Dowset v. Sweet*,⁴ *Parsons v. Parsons*,⁵ and *Stockdale v. Bushby*,⁶ in the last of which the name was mistaken, and *Garth v. Meyrick*,⁷ where, in a devise to six children, one name was twice repeated, and another wholly omitted, but each of the six was held entitled to take ; and *Doe d. Cook v. Danvers*,⁸ *Ryall v. Hannam*,⁹ and *Blundell v. Gladstone*,¹⁰ where the description was incorrect. When the last of these cases was in this House, Lord Brougham clearly explained¹¹ the principle on which questions of this sort must be decided. *Adams v. Jones*,¹² and *Doe v. Huthwaite*¹³ establish the same principle ; and in this last case it was held to be a question of fact for the jury, on evidence admitted for that purpose, whether a mistake was in a * name or a description. In *159 *Beaumont v. Fell*,¹⁴ though both the legatees' Christian and surnames were mistaken, the legacy was held good.

Mr. Shapter for the respondent. — The cases quoted are inapplicable here. In all of them the doubt was created by the testator in the name or in the description, but his intention was clear, and by name or description he furnished the means of ascertaining it. That was the case in *Newbolt v. Pryce*.¹⁵ In this case it is

¹ Vol. I. p. 331.

² Finch, 403.

³ 6 Mad. 350.

⁴ Ambler, 175.

⁵ 1 Ves. Jun. 266 ; see the note there, where many cases are collected.

⁶ G. Coop. 229.

⁷ 10 Beav. 536.

⁸ 1 Brown, C. C. 30.

⁹ 1 Phillips, 279.

¹⁰ 7 East, 299.

¹¹ 1 H. L. Cas. 791, *nom. Camoys v. Blundell*.

¹² 9 Hare, 485.

¹³ 3 B. & Ald. 632.

¹⁴ 2 P. Wms. 141, overruled in *Miller v. Travers*, 8 Bing. 244, 1 Moore & S. 312.

¹⁵ 14 Sim. 354.

otherwise. Here there is no patent ambiguity on the face of the will, and the evidence shows that the testatrix was not personally acquainted with Thomas. *Delmare v. Robello*¹ is an authority directly against the appellant. There the testator devised to all the children of his two sisters, A. and B. He had a third sister, but did not name her. Before the date of the will, A. became a nun and had changed her name, and the third sister, who was married and had children, put in her claim, but the Court dismissed the bill. There is nothing in this will to show that the testatrix intended to provide for all the children. She plainly selected some from the others, and she left Thomas without any provision. The eldest son, too, is named executor in terms which, before the 11 Geo. 4, and 1 Wm. 4, c. 40, would give him the whole of the property in the residue. The first and third propositions in Wigram on Extrinsic Evidence² are decisive against the appellant. The former is, that "a testator is always presumed to use the words in which he expresses himself according to their
 * 160 strict and primary * acceptance, unless, from the context of the will, it appear that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed." The other proposition is: "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to those circumstances, they are capable." There is nothing here to show that the testatrix used the words in any but their strict and primary acceptance.

Mr. Anderson, in reply. — *Newbolt v. Pryce* is an authority for the appellant, for it shows that a mistake in a name and description may be corrected by reference to the context of the will. The fifth proposition in Wigram on Extrinsic Evidence justifies the course which the appellant asks the Court here to pursue. It

¹ 1 Ves. Jun. 412, *nom.* *Del Mare v. Rebello*, 3 Brown, C. C. 446.

² Pages 13, 29.

is this :¹ "For the purpose of determining the object of a testator's bounty or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will and to the property which is claimed as the subject of disposition, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will." The case of *Delmare v. Rebello*, as reported in Brown's Chancery Cases,² shows very distinctly that the doctrines * now con- * 161 tended for by the appellant were there acted on, but that the Court decided that case on the ground that the testator had expressly named the two persons whom he intended to benefit; that there was no ambiguity about either, and that he had not intended to make any devise in favour of the third sister.

THE LORD CHANCELLOR, after fully stating the case, said : The question which we have now to consider is, whether the "John Mostyn" named in the will is the "Thomas Mostyn" who, among the children of the testatrix's brother, followed Samuel Mostyn in the order of birth; that is the first question; and if that is decided against him, it is the only question. The Master of the Rolls held that that was a conclusion at which the Court could not safely arrive, and Lord Justice Turner was of the same opinion. Lord Justice Knight Bruce differed from them. Having considered the case attentively with reference to the authorities bearing upon it, I am clearly of opinion that the decision of the Master of the Rolls and of Lord Justice Turner is the correct view of the case and of the law upon this subject.

It is very possible that this was a mistake, but I think that is a conjecture upon which it would be very unsafe for any Court of justice to act. What is said is, that inasmuch as the testatrix first mentions her eldest nephew, who was Robert Henry Mostyn, and calls him Robert Mostyn, and then mentions her second nephew correctly, John Henry Mostyn (the only one whom she does name quite correctly), and then says, that in the event of his dying without issue, his interest was to fall into the hands of Samuel Mostyn and John Mostyn and Mary Davies, these must mean the three other children. It is said that "Samuel Mostyn"

¹ Page 51, 3d ed.

² Vol. III. p. 446.

* 162 may reasonably be supposed to mean * Samuel Johnson Mostyn, that " Mary Davies " may well mean Mary Margaret Davies, and that " John Mostyn " may have been written by mistake for Thomas Mostyn. And to confirm this view there is some evidence given that she had not known the family intimately for some years, and that she mistook the name, probably, because Thomas was born after the intimacy with the family had ceased.

Now I agree with Lord Justice Turner upon this subject, that possibly it may be a mistake, but I do not know that the circumstance of her calling a legatee " John Mostyn " would of itself have excluded John Henry Mostyn, because then, by a parity of reasoning, all the other children would have been excluded. Robert Henry Mostyn is called in the will " Robert Mostyn," Mary Margaret Davies is called " Mary Davies," and Samuel Johnson Mostyn is called " Samuel Mostyn "; and therefore " John Mostyn " might well have meant John Henry Mostyn. But it is said that she could not mean John Henry Mostyn, because, in the previous part of her will she has designated him as John Henry Mostyn, and has given to him an absolute interest if he marries; and that it is strange that she should then mean to give him an interest with the others if he did not marry, for it could only be an interest that vested at his death. Certainly all these circumstances make it not an improbable conjecture that this might have been a slip. But I think it is impossible for a Court of justice to act upon that suggestion. We cannot ask the testatrix in her grave what she meant; if we could, she might say, " I said John, and I meant John." There is nothing in the will inconsistent with that. And, therefore, what we are now asked to do might be in direct violation to the intentions of the testatrix.

* 163 The next question is, how is this case affected by the * authorities upon the subject? It seems to me that the authorities that have been relied on in no respect bear out the proposition which has been contended for. We were referred to Mr. Jarman's very excellent work,¹ in which all the cases upon this subject are collected; but they are distinguishable at the very first blush from this case. The earliest case that was referred to was that of *Pitcairne v. Brase*.² In that case there was a bequest to " William

¹ Vol. I. p. 331.

² Finch, 403.

Pitcairne, the eldest son of my brother, John Pitcairne." By the context it was clear that the party intended was the eldest son, though he was wrongly called "William." There was a perfect *constat* as to the person intended.

In *Dowset v. Sweet*¹ the testator gave his property to John and Benedick, "the two sons of my brother, John Sweet"; whereas the names were really "James" and "Benedick." But the brother had only two sons, so that it was perfectly clear that it was a mere lapse, and that he could not mean any one else. It was stated in the report that there was further evidence adduced that the testator was in the habit of calling this son "Jackey," which might have been a short way of describing him either as John or James. But Lord Hardwicke did not rely upon that; he said that if the name had been Andrew, or any thing quite different, or if he had given it to "Arthur and Edward, the two sons of my brother," neither of whom was named Arthur or Edward, he should have held that that would not have altered the case, because it was plain that the persons he meant were the two sons.

So, again, in *Parsons v. Parsons*,² the testator gave some property to his brother, Edward Parsons; whereas his name was not Edward; that was clearly a slip, for he must have known his brother's name; he gave to Edward *Parsons for his *164 life, and afterwards "to the two children of my said brother by his present wife." He had only one married brother at that time. It was perfectly obvious that the person to take was a brother who had a wife, and as there was only one person who answered that description, Lord Loughborough had no hesitation in saying that that was a mere slip, and that "Edward" had been written wrongly for another name.

There are many other cases to the same effect. One of them is *Camoy's v. Blundell*,³ which went through all the Courts, and was eventually decided in your Lordships' House. It was a gift to the second son, "Edward Weld, of Lulworth." The person really intended was Joseph Weld, of Lulworth, who succeeded as being the then second son of the former possessor, the real second son, Edward Weld, having died without issue, and the third son, therefore, Joseph Weld, succeeded as the second son, and the estate

¹ Ambler, 175.

* 1 H. L. Cas. 778.

² 1 Ves. Jun. 266.

was given to the second son, described as "Edward Weld, of Lulworth," although, in truth, it was Joseph Weld, of Lulworth. There was no "Edward Weld, of Lulworth," excepting one of Joseph's sons who was named Edward. The learned Judges were consulted in that case, and this House adopted their opinion. The clear opinion of the Judges was, that in describing a man as "of Lulworth," the father was meant, and not one of the younger children.

There are many other cases, but all of them go upon the same principle, that there is something either of legitimate extrinsic evidence or of internal evidence, not only to show that the name must have been put wrongly, but also to show who must have been intended. But there was a case much relied upon, which goes upon a different principle, the case of *Dent v. Pepys*,¹ * 165 before Sir John Leach. In that case it was apparent upon the face of the will, at least so Sir John Leach thought, not from extrinsic evidence at all, but upon the face of the will, that the testator had written "William," meaning "Mary." The testator there gave two fifths of his property to the four children of his sister, or late sister, Mary, in the following proportions: that is to say, it appearing that there had been one child, William, by a former marriage, and three by a subsequent marriage, a certain proportion of the two fifths is given to the children of William, and the residue to the children of William. Sir John Leach said that that was an absurdity; that in the gift of the residue he must have meant Mary. He begins by saying that he means to give it to all the children, and then gives a clear definite proportion to the children of the son by the first marriage, and the residue to the other children. Whether that was quite a legitimate conclusion or not, is not now necessary to speculate upon; but it is clear that that went upon a totally different principle from the other cases.

None of these doctrines applies to the present case. There is nothing that shows of necessity that John Mostyn was not intended; still less is there any thing of necessity to show that Thomas Mostyn was intended, which is the point the plaintiff has to make out. Upon these short grounds it appears to me that we ought to affirm the judgment of the Court below, though I do not mean to say that we may not possibly be coming to a decision which in truth may not carry into effect the testatrix's intention.

¹ Madd. & G. 350.

But I think, as a general rule, it is not open to Courts of justice to speculate about what is meant when the words that have been used may receive a rational and intelligible meaning. I am therefore of opinion that the judgment below was perfectly right, and that consequently the decree ought to be affirmed. If Thomas had taken, there would *have been a question as *166 to what he took, but that question does not arise now.

LORD BROUGHAM. — My Lords, in this case extrinsic evidence has been admitted, but not for the purpose, as I apprehend, of enabling your Lordships to speculate upon the intention of the testator, but of showing (which was the only ground upon which it could have been admitted) what the state of the family was at the time the will was made. I entirely put out of view what is said in the affidavit of the respondent, and in the counter affidavit on the other side, as to the declarations of the testatrix; I throw that entirely out of the question; but it may be material to consider the fact stated in the respondent's affidavit as to the impossibility, from the dates of the various events, of her having a knowledge of Thomas Mostyn, who was born, I think, after she quitted Calcott Hall. That is very fit to be considered, and undoubtedly it rather goes in support of the opinion that by "John Mostyn" she did not mean Thomas Mostyn.

My Lords, the question is, whether, in this case, there is, upon the state of the family as disclosed to us, and not disputed, and upon the will itself, any reasonable ground for supposing that the words "John Mostyn," here coming between "Samuel Mostyn" and "Mary Davies," meant Thomas Mostyn. Now, upon the best consideration that I have been able to give to this matter, I really can see but one circumstance tending to that conclusion, and that, I think, is too feeble to support any such conclusion; namely, that it is in evidence, and is not disputed, that the order in which these persons came in the family was, Samuel Johnson Mostyn, then Thomas Mostyn, and then Mary Margaret Davies. They came in the family in that order, *undeniably; and here *167 you have in this will a direction that the bequest is to be divided equally between Samuel Mostyn, that is Samuel Johnson Mostyn, John Mostyn, and Mary Davies. It may be contended, and it is possible, and even probable, that the party coming in the will between Samuel Johnson Mostyn and Mary Margaret Davies

is this Thomas Mostyn, because he comes in that order in the ages of the family. But I think that is much too feeble a ground upon which to rest a speculation as to what was the meaning of the testatrix, and therefore I certainly come to the same conclusion as my noble and learned friend, that there is not enough to justify us in supposing that by John Mostyn she here meant Thomas Mostyn.

Reference has been made to the different cases that bear upon this matter, and to the book, most justly commended by my noble and learned friend, of Mr. Jarman. He there gives not only a most convenient summary of the cases, but he accompanies them with comments, in the greater part of which I entirely concur.

The work of Sir James Wigram on extrinsic evidence was also cited at the bar, and it is a book deserving of the greatest commendation. I think nothing can be more judicious than his comments upon the cases which he has collected; I will, however, make one exception. There is one case, *Hiscocks v. Hiscocks*,¹ which he does not appear to have considered in its relation to *Beaumont v. Fell* with his usual accuracy; for after referring to *Beaumont v. Fell*,² and to its being impossible to reconcile it with *Miller v. Travers*, he says,³ "The case of *Beaumont v. Fell* is pointedly noticed with

disapprobation in *Hiscocks v. Hiscocks*." Now it is not *168 pointedly noticed with disapprobation * in *Hiscocks v. Hiscocks*; for in the very able and elaborate judgment in *Hiscocks v. Hiscocks* all that is said is, that "*Beaumont v. Fell*, though somewhat doubtful, can be reconciled with true principles upon this ground, that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatly." There is evidently therein no such pointed disapprobation of *Beaumont v. Fell* as Sir James Wigram appears to have supposed. But I take *Beaumont v. Fell*⁴ no longer to be law: I take it to have been overruled by *Miller v. Travers*,⁵ a case which received the greatest possible consideration from those two most learned Judges, the then Lord Chief Baron Lord Lyndhurst and Lord Chief Justice Tindal, whose assistance I called in on account of the great importance of the question then before me. We had it argued most elaborately, and after great

¹ 5 M. & W. 363.

⁴ 2 P. Wms. 141.

² 2 P. Wms. 141.

⁵ 8 Bing. 244, 1 Moore & S. 342.

³ Pl. 193.

consideration judgment was given by Lord Chief Justice Tindal, in which Lord Lyndhurst and myself entirely concurred. The judgment in *Miller v. Travers* has been repeatedly referred to in various cases, and always with the greatest approbation. I take it that it may be said to lay down the law upon the subject as distinctly as it is possible for any important point of law to be laid down. The cases in which it has been referred to are, I think, *Doe dem. Gord v. Needs*,¹ and *Hiscocks v. Hiscocks*;² and it must have been referred to in many other cases, and always with approval, or at least never in a way to show that any learned Judge has thrown any doubt whatever upon that case. I thought it my duty to mention the case of *Beaumont v. Fell*, as alluded to in Sir James Wigram's book, in consequence of the reference made to * that work, and the just commendation bestowed * 169 on it in the course of the argument at the bar. Reference was also made to the case of *Camoy v. Blundell*,³ in which I had the misfortune of differing in some respects from the opinion of the Judges, and also from my noble and learned friend the then Lord Chancellor. But the difference of opinion which I then expressed did not go in the least degree to affect the principles of the decision in that case.

Lords' Journals, July 14, 1854.

* O'CONNOR v. HASLAM.

*170

1855. March 19, 20.

ALICIA O'CONNOR and others, *Appellants*.
JOHN HASLAM, *Respondent*.

Will. Debts of other Persons. Statute of Limitations.

A., who had a life interest in certain estates, gave a bond to a creditor and a warrant of attorney to confess judgment for its amount. No judgment was entered up. A. died within three years of the date of the bond, leaving no assets, real or personal. B., his son, the first tenant in tail of the estates, entered into possession, and expressed in letters to the creditor a wish to pay

¹ 2 M. & W. 129.

² 1 H. L. Cas. 778.

³ 5 M. & W. 363.

his father's debts, but would not give any security for them. B. made a will, in which, reciting his own wish, and a promise in conformity with it, made by him to his father and mother, he said, "And in case I should not be able to fulfil my intentions during my lifetime, and that I should not have a sufficient fund for that purpose arising from my personal estate, I hereby charge all my just debts, and also all the debts of my late father, A., which shall remain unpaid at the time of my decease, upon all my real estates wheresoever," &c. He then directed his trustees to stand seised of all his estates "subject in manner aforesaid to the payment of all my just debts and to the debts of my father." B. survived his father many years. The obligee of the bond filed a charge thereof against the trustee under the son's will: —

Held, that the debts of the father, which were not barred by the Statute of Limitations at the death of the father, were charges on the real estates of the son.

HENRY MALONE was tenant for life of certain estates in King's County, and had a son, Richard Malone, who was first tenant in tail in remainder of these estates, and who bound himself by a voluntary promise to his father and mother to provide for his father's debts. Henry Malone, in April, 1811, executed a bond and warrant of attorney to secure to the respondent payment of the sum of 100*l*. By letter of the 30th January, 1813, Henry Malone requested the respondent not to enter up judgment on this warrant of attorney; but then, and on other occasions, the

* 171 * last of which was on the 26th of June, 1813, he acknowledged the debt, and promised to pay interest thereon, and to pay the principal when in his power. Henry Malone died in 1814, having no assets whatever, though he left a will and appointed his son executor. Richard Malone entered into possession of the estates. In September, 1823, the respondent wrote to Richard Malone on the subject of this bond debt, and on the 22d of that month received an answer, saying that Richard Malone had no doubt of the justice of the demand, and that it was his wish and determination to settle it, as well as any others of the same nature, as soon as he could. Upon another application on this subject, Richard Malone declined to give his bond for the amount, but repeated his acknowledgment of the debt, and his wish to pay this, as well as the rest of his father's debts, adding that in doing so he should be guided by the nature of them, and by his own convenience, but that it had always been his determination not to make himself personally responsible for them. Towards the end of 1825, the respondent again wrote to Richard Malone,

intimating that he intended taking proceedings on Henry Malone's bond and warrant of attorney, to which Richard Malone, on 22d November, 1825, answered that he was not liable for his father's debts, as his father left no property, and had only been tenant for life of the estates ; but at the same time Richard Malone declared that it was his intention to pay his father's debts so soon as his own affairs would admit of his doing so, and that if he should not live to pay them, he would take measures to secure them on his property, in whatever manner might be most expedient, under the advice of counsel. A similar letter, and a like answer, passed between the parties in 1827. On the 30th April, 1830, Richard Malone made and published his last will and testament, by which he devised all his estates, * real and personal, to *172 trustees, " upon the trusts and for the purposes hereinafter expressed and declared of and concerning the same, which trusts I feel confident they will have performed, according to my true intent and meaning. And as it is my most anxious wish that not only all my own just debts of every description whatsoever should be paid, but also those of my father, from my respect to his memory, and in compliance with a promise I made him and my dearest mother ; and in case I should not be able to fulfil my intentions during my lifetime, and that I should not have a sufficient fund for that purpose arising from my personal estate, I hereby charge all my just debts, and also all the debts of my late father, Henry Malone, esquire, which shall remain unpaid at the time of my decease, upon all and every my real estates wheresoever situate, to be paid out of the rents, issues, and profits thereof, in the manner hereinafter mentioned, but not to be raised by sale or mortgage thereof, or of any part thereof." After making certain specific bequests, the testator proceeded : " And it is my will, and I do further devise, direct, and declare that the said Henry O'Connor, and Alicia his wife, Hugh Morgan Tuite, and Thomas Ardill, and their heirs and assigns, shall stand and be seised of all my estates, lands, tenements, and hereditaments, situate in the King's County, as well those which I inherited from my late father as those which have come to me under and by virtue of a deed of conveyance made to me by the late Miss Henrietta Malone, and Miss Catherine Malone, including, amongst said estates, my house and demesne of Pallas Park ; subject, however, in manner aforesaid, together with my other estates hereinafter mentioned, to the

payment of all my just debts, and to the debts of my father, and to the payment of the annuities and legacies hereinbefore and after mentioned, in trust for the use of my said sister,

* 173 Alicia O'Connor, and of the * said Henry O'Connor, and of the survivor of them, for and during the natural lives of them, the said Alicia O'Connor and Henry O'Connor, and of the survivor of them." Towards the close of the will there was a declaration that the trustees should stand possessed of the said estates, for the various purposes therein mentioned, "and also in payment and discharge of the debts of my late father, Henry Malone." Richard Malone died on the 6th January, 1834.

Lydia Carr, a judgment creditor of Richard Malone, filed her bill in the Court of Chancery in Ireland on the 18th April, 1839, against the executors and trustees of the testator and the other persons interested in the estates, praying for an account of his real and personal estates and for relief, and on the 14th of June, 1841, the Lord Chancellor made the usual order and decree.

The respondent, on the 25th January, 1842, filed his charge in the Master's office under this decree, alleging that Henry Malone, the father of the said Richard Malone, was justly indebted to him in 100*l.*, and to secure the same had granted his bond and warrant of attorney; that judgment had never been entered up; and then he set out the various letters already noticed. The appellants filed their discharge to the said charge on 24th May, 1842, denying the matters stated, and insisting that if such matters could be duly proved the provisions of the will of Richard Malone did not operate to make the bond debt a charge on his estates, and they relied on the Statute of Limitations (3 & 4 Wm. 4, c. 27, § 40) as a bar to the charge. On the 14th January, 1845, the Master disallowed the charge, and ruled that the right to recover on the bond was barred and extinguished. On the 9th December, 1850, the Master made a formal report, finding that the respondent was not entitled to be paid his demand out of the funds

* 174 * in the said cause. The respondent excepted to this report, and the exceptions having been heard before Lord Chancellor Brady, his Lordship, on the 20th February, 1851, made his decree, by which he allowed the exceptions. This appeal was brought against that decree.

Mr. Fleming and *Mr. Cairns* for the appellants. — There was

not at the period of the death of Richard Malone any debt due to the respondent to which the estate of Richard Malone was liable. If any such debt had ever existed it was then barred by the Statutes of Limitations, and the will did not revive it, and no debt of Henry Malone was made a charge on the estates of Richard Malone, except such as was valid and subsisting at the time of his death. The Lord Chancellor was disposed to adopt the view taken by the Master until the case of *Richards v. Foster*¹ (heard in the Common-Law Courts as *Foster v. Ley*) was quoted to him. His Lordship adjourned the matter, in order to make inquiries into that case, and afterwards declared himself bound by its authority and unable to distinguish this case from it. But there the point now to be considered was really never discussed. In *Foster v. Ley* it was held at common law, that where a testator had directed payment of debts not his own, the legacy duty was payable by the creditor and not by the testator's estate. When the case was in Chancery it appeared that in the will of a testatrix there was a direction to pay all the debts of Glubb, her first husband, "that can legally and satisfactorily be proved against him." The bill was filed to ascertain what debts could be so proved; but the order to the Master was to find what *debts of Glubb *175 "remained undischarged." Such an order upon such a bill never could have been made but by consent, and for that reason the case was not reported. It is, under these circumstances, a case of no authority in the present discussion. There, too, no question arose as to the Statute of Limitations: time had not run against the claim.

Here time had run against the claim before the death of Richard Malone. It cannot be taken that there was a charge created to pay all the debts of the father, for then all that he had ever owed, and not merely those which were not barred at the time of his death, would be charged upon the son's estate, a kind of charge which, in *Burke v. Jones*,² Vice-Chancellor Plumer condemned as "absurd." Yet, without such a construction of this will, the present claim cannot be maintained. The testator's intention, which the Lord Chancellor of Ireland proceeded upon as the foundation of his judgment, certainly did not go to that extent, for he makes

¹ M. S. It arose out of the will which was the subject of discussion in *Foster v. Ley*, 2 Bing. N. C. 269. The words of the will are there set out.

² 2 Ves. & B. 275.

“my own just debts” payable in the first instance, and then those of his father. On these words the rules of law become applicable, and those debts which are not barred by the statute at the time of the testator’s death are those alone which can come under the description of “my own just debts.” That restrictive description applies to both classes of debts, and such as would have been recoverable by process of law at the death of the debtor are those alone which can be charged on his real estate. This is undoubtedly the case as to the son’s debts, and there cannot be a different rule of law applied to the same words of a charge of debts merely because the subject of the charge is in one instance the debt of a father and in the other the debt of a son. Such a double

* 176 * construction of the same direction in a will would be anomalous.

The debt claimed by the respondent is barred by the statute. There is not in any of the letters any thing like a promise to pay, so as to revive it, and the words of the will cannot have that effect. *Fearn v. Lewis*¹ much resembles this case. The defendant there said, any obligation should receive such attention as an honourable man would be bound to give it; that it was his intention to pay, but that he must be allowed time; and the Court held that these words did not constitute such a promise as would take the case out of the Statute of Limitations. Vice-Chancellor Plumer acted on a like principle in *Burke v. Jones*,² though there the will directed the executor not to set up the statute.

The rule of law, as stated by Lord Redesdale in *Fergus v. Gore*³ is, that “a devise in trust for payment of debts does not prevent the setting up the statute, if it had run before the death of the testator; for the debts are then presumed to be paid.” *Scott v. Jones*,⁴ in this House, overruling *Jones v. Scott*,⁵ proceeded upon that principle, as did also *Freaker v. Cranefeldt*,⁶ and in that respect there is no distinction between simple contract debts and bond debts. In *Hargreaves v. Michell*⁷ the Vice-Chancellor said that a trust to pay debts could only apply to such debts as the person creating it was bound to pay, and not to such debts as were barred by the Statute of Limitations. The decisions are uniform upon

¹ 6 Bing. 349.

² 2 Ves. & B. 275.

³ 1 Sch. & L. 107.

⁴ 4 Clark & F. 382.

⁵ 1 Russ. & M. 255, 261.

⁶ 3 Mylne & C. 499.

⁷ Madd. & G. 326.

this point. It is clear that that rule must apply to the son's debts, and the same rule must be equally applicable to those of * the father, for by writing and acknowledgment he might *177 have kept alive his father's debts, and an action might have lain against him in his lifetime for his father's debts, as well as for his own. The two classes of debts were, therefore, in the same position, and consequently were governed by the same rules, and such of them of either sort as became barred in his lifetime were not revived by his will, and are not chargeable against his estate.

The Solicitor-General for Ireland (*Mr. Fitzgerald*), and *Mr. Hetherington* for the respondent, were not called upon to argue.

THE LORD CHANCELLOR. — My Lords, this is an appeal from a decree of the Lord Chancellor of Ireland, made on the 20th of February, 1851.

The single question for your Lordships to decide is, whether the Lord Chancellor of Ireland was correct in the conclusion at which he arrived.

When cases are being argued at your Lordships' bar, even if I think the appellant has not made out his case, I am seldom inclined to stop the argument, because I think sometimes the elucidation of these cases, and the arguments on both sides, tend to throw light which is useful to a Court of ultimate appeal. But this case has appeared to be so entirely free from doubt, that it would be a waste of time to occupy any further time with the discussion of it.

The principles which regulate charges of debt upon the real and personal estate of testators, although at one time doubtful, have, I think, of late years been pretty well settled. As a general principle, it may be taken that a charge of debt upon personal estate, where it merely directs that to be done which must have been done if no direction * had been given, is simply *178 inoperative. It was so decided in the case of *Scott v. Jones*,¹ which came before your Lordships' House.

With regard to the charge of a testator's own debts upon the real estate, by his will, the effect is, that whereas the real estate could not, but for that charge, and according to the old law would not have been, liable to the payment of the debts, it is thereby

¹ 4 Clark & F. 382.

made liable to them ; but what constitutes debts is a question not affected by that charge ; therefore wherever there was a good defence to any demand, that defence remained good, notwithstanding the charge of the debts upon the real estate. That was settled in the case of *Burke v. Jones*,¹ and I believe has never been questioned.

In this case there is this difference ; there is no doubt that the Statute of Limitations would be a perfectly good bar to a charge by this testator on his own estate for the payment of his own debts. There is no doubt that that would mean such debts as could be recovered from him on the day of his death. If the debt has been barred before his death the charge does not revive it. How is it then, when a testator charges on his real estate the debts not only of himself, but of his father ? That is said to be a new question. So far as I know, with the exception of the case of *Richards v. Foster*, it may be a new question. But I must own that it appears to me, at all events with reference to the present will, to be a question admitting of as little doubt as can possibly be imagined. It is said that it is a very anomalous thing if a man is making a will and charging his real estates with the payment of his own debts and the debts of his father, that a different construction should be put upon what he means by “debts” when speaking of his own debts, and what he means by the

*179 *same word when speaking of the debts of his father. I

agree that it would be very anomalous, and I think that no different construction is to be put upon the words when the testator adds the debts of his father to those of himself as a charge upon his real estate ; in one case he means all that could be recovered at his own death as being his own debts, in the other, all that could be recovered from the father at his father’s death. That is obviously what is meant. So far from putting a different construction upon the same words, we are putting substantially the same construction upon them. In the present case any other construction would lead to consequences the most absurd. It was a voluntary act of the testator to charge the debts of his father upon his own estate, and you cannot suppose that at the moment he was writing, “ I charge all my just debts, and also all the debts of my late father, upon my estate,” he meant to exclude all the debts of his father which would become barred before his own

¹ 2 Ves. & B. 275.

death, for that would have been to exclude nine tenths, if not the whole of them, from payment, and to render the charge wholly ineffective. The will is dated 1830. The testator's father had died in 1814; there is a period, therefore, of sixteen years; in fact, it is nearly twenty, for there are two codicils, duly executed and attested, not altering the terms of the will, yet in both instances referring to it, and therefore adopting it, at those remoter times, one of them being made at the end of 1833, when within a year at all events, probably within a few months, the whole charge of the father's debts would have been a nugatory act if the construction contended for by the appellants is to be put upon the language of the will.

That, therefore, appears to me to exhaust the subject, independently of that case of *Foster v. Richards*, the decision in which, I believe, my noble and learned friend thinks was altogether right. I think, myself, that in all *probability it was so; * 180 I am not quite certain about the facts in that case. I think there is an indication that there was something in the nature of an arrangement there, and for this reason: the Master, by his report, finds the debt to be due, but disallows the interest; I cannot understand why that should be done, for if there was a debt due from the defaulting trustee, I think that debt so due from the defaulting trustee must have been a debt due with interest at four per cent. I think probably, therefore, there was some arrangement in that case. It appears to me, however, that the conclusion which was come to in that case was perfectly reasonable, and exactly the same as was come to in this case. I do not suppose it ever was very elaborately argued, because otherwise we should have had it reported. That, however, does not nullify the authority of the decree. Perhaps it is of less authority than if it had been canvassed and then reported. But at the same time it was a very good authority for the Lord Chancellor of Ireland to deal with. It is not, however, necessary to refer to that case, for I hold that if this case had been simply to be decided as *res integra*, I should have had no hesitation in coming to the same conclusion as did the Lord Chancellor of Ireland; I therefore move your Lordships to affirm this decree.

LORD ST. LEONARDS. — I entirely concur with the view stated by my noble and learned friend, and if your Lordships look at the

words of this will, you will perceive that it would be a great disappointment of the intention of the testator if you adopted a construction different from that which has already been placed upon them.

It must first be borne in mind that the testator was in no respect liable for the debts of his father. I think your
 * 181 * Lordships must consider, although it is not proved to be a fact, that the father was only tenant for life of the real estates, and the son succeeded to those estates as the tenant in tail in remainder, and therefore was not in respect to those estates liable to any of the debts of his father. I think it must be taken as a fact, that although he was his father's executor, there were no assets, and the creditor now claiming does not appear ever to have attempted to take any steps in order to recover his debt against the assets of Henry Malone, the father, which would have been the proper fund for the payment of his debts, if any such fund had ever existed.

As there was no liability on the part of the son, let us see what the words of the will are. [His Lordship read them.] The words are perfectly clear. The difficulty has arisen alone, as I apprehend, from the circumstance that the same provision includes the two classes of debts, viz. his own debts, to which he was clearly liable, and the debts of his father, to which he was clearly not liable, and it is said, "How can you place a different construction upon the same words?"

Now, as far as a man provides for his own debts, he provides for that to which he is liable, and the question that you have to determine in this case simply is, to what extent is he liable to certain debts which are now barred by the Statute of Limitations? The provision of that statute was introduced by the Legislature to bar all dormant and stale claims. When, therefore, a man makes a provision for his debts, he makes a provision for those debts which are not barred by the Statute of Limitations, that is to say, for those which can be deemed, and in law are deemed, debts, because he has the benefit which the Legislature has given to him as a protection against stale demands. They are not debts
 * 182 which are recoverable; * therefore they are not his debts.

The law has barred them. But as regards the debts of another person, in this particular case the debts of the father, what possible aid can he require from the Statute of Limitations? They

never were the testator's debts. He never was liable to one of them. The Statute of Limitations, therefore, protecting persons against stale demands, was a dead letter as to them so far as he was concerned, because no such debt could be charged against him at all; he was not liable to it. Consequently he required no aid from the Statute of Limitations. How then, when he chooses voluntarily to make a provision for his father's debts, to which he was not liable, can you bring in force the Statute of Limitations, as against that provision, to bar these debts which the statute never, by any possibility, could operate upon as regarded him? To him it was wholly a matter of indifference whether the statute had operated or not. He was not at any time liable, therefore the statute never could operate in his favour. The statute operates upon his own debts, because his executors are to ascertain his debts, such as the law places as liabilities against his real and personal estate. But as regards the debts of his father, they never were chargeable upon him, and therefore the statute has no operation.

We are not called upon to ascertain what the law would be with regard to debts barred as against the father. We are only called upon to decide what is the effect of the law upon debts which were good debts at the death of the father, and were debts which would have been charged upon any assets of the father. The son says, "Out of respect to my father's memory, and in compliance with a promise that I made to him and my dearest mother, I will voluntarily pay all the just debts of my father. I will provide a fund for that purpose." That fund must necessarily * be * 183 to answer that obligation which existed against the father, and to meet which the father left no assets.

This debt was precisely in that predicament. It was a debt which legally existed at the time of the father's death. It was a debt binding upon the father at his death, and would have bound his assets, if there had been any, and this gentleman, his son, very much to his credit and honour, provides a fund for that purpose. The law fortunately does not stand at all in the way of giving effect to that provision, and without feeling any difficulty whatever as regards the two classes of debts being provided for by one provision in the will, I think the decision of the Lord Chancellor of Ireland was perfectly right. You refer each gift to the particular clause, and I agree with my noble and learned friend who has

already spoken upon this subject, that it is in effect the same. The debts of each are referred to the death of each, and you then inquire whether it was an operative debt or not. I hold that it is a case not open to any doubt, and therefore that this appeal should be dismissed with costs.

LORD BROUGHAM. — I am quite clear upon this case, and I entirely concur with the views which have been expressed by my noble and learned friends.

With reference to the case of *Richards v. Foster*, I have no doubt that it was rightly decided. At the same time I think it quite clear that if that had differed from other cases and had been the only case of the sort, it would have been liable to all the observations which have been made upon it at the bar, especially those which were made by Mr. Cairns, because, from the history of the case, it clearly appears that it had received no argument at the Rolls Court, and therefore we may say that it had not received a very full consideration.

* 184 * LORD ST. LEONARDS. — The decree, of course, in that case, went in words much beyond the will, and that might be open to observation, because the will certainly spoke of debts which could be legally proved, and therefore were legally recoverable, whereas the decree itself spoke generally of debts undischarged; but whether “debts undischarged” were the debts which the testator meant to include, might be a question in the case. It would rather, therefore, be a criticism upon the words of the will than an impeachment of the principle upon which the case was decided.

Decree affirmed, with costs.

Lords' Journals, 20 March, 1855.

*JORDEN v. MONEY.

*185

1854. June 22, 23, 26, 27, 30; July 3, 7

W. P. JORDEN and LOUISA, his wife, *Appellants*.
 JAMES WILLIAM BAYLEY MONEY, *Respondent*.¹

Agreement. Representation. Marriage. Equity. Evidence.

Where a person possesses a legal right, a Court of equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will Equity interfere even though the parties to whom these representations were made have acted on them, and have, in full belief in them, entered into irrevocable engagements. To raise an equity in such a case, there must be a misrepresentation of existing facts, and not of mere intention (Lord St. Leonards *dissentiente*).

Per LORD ST. LEONARDS: "It is immaterial whether there is a misrepresentation of a fact as it actually existed, or a misrepresentation of an intention to do or abstain from doing an act which would lead to the damage of the party whom you thereby induced to deal in marriage, or in purchase, or in any thing of that sort, on the faith of that representation."

W. M. had given a bond and warrant of attorney to secure the repayment of a sum of money. Judgment had been entered up, but not executed; the bond and warrant of attorney came into the possession of L., as personal representative of the original obligee. She was on terms of affectionate friendship with W. M., and often said that he had been unfairly treated, in being made to enter into these securities. L. had in early life received from the father of W. M. a conveyance of some property in India; the deed of conveyance was expressed to be for a money consideration of 10,000 rupees: in truth the money consideration was, if any, a debt of 1200 rupees, the rest was a purely voluntary gift, and no money whatever passed, when the conveyance was executed. W. M. was about to marry, and when his marriage was in contemplation discussions arose about the bond and warrant of attorney. W. M.'s father told L., that he was advised, if she did not abandon the claim on the bond and warrant of attorney against his son, to execute a deed which would put an end to the conveyance of this Indian property as a voluntary conveyance made without consideration. In his depositions, he said that L. promised not to enforce the bond and warrant of attorney, if he would abstain from interfering with the conveyance. Other evidence was given of declarations by her, that she "had abandoned" the claim, and of a promise, often repeated, that she would never trouble W. M. about it:—

* *Held*, that this promise, if it constituted a contract, was not a contract *186

¹ *Smith v. Osborne*, 6 H. L. Cas. 386; *Rose v. Watson*, 10 H. L. Cas. 677.

made "in consideration of marriage," so as to bring it within the words of the Statute of Frauds.

The evidence of a single witness cannot be received against the answer of a defendant, unless there are circumstances which go to corroborate the witness as against the answer.¹

THIS was an appeal against a decree originally made by the Master of the Rolls, and afterwards affirmed on appeal in the Court of the Lords Justices. The decree was pronounced in a cause instituted by James William Bayley Money, commonly called in the suit William Money, against Mr. and Mrs. Jorden, and other parties, praying that a certain debt of 1200*l.*, secured by a bond and warrant of attorney, might be declared to have been abandoned, and that the defendants, Mr. and Mrs. Jorden, might be decreed to release the plaintiff from the bond, the warrant of attorney be given up to be cancelled, and satisfaction entered up on the judgment which had been obtained against the plaintiff, or else that it might be declared that this was a partnership transaction arising upon this bond, and that the plaintiff was liable only for a portion of the bond debt.

Mrs. Jorden was formerly Miss Marnell. She married late in life, in England, having been in the earlier period of her life in India, with her two brothers, one of them Richard Marnell, a barrister, at Calcutta, and the other Charles Browne Marnell, an attorney and solicitor there. Mr. George Money, the father of the plaintiff in the cause, was also a barrister at Calcutta, and held the lucrative office of Master of the Supreme Court. These parties were upon very friendly terms with each other, and while they were all resident in India, Mr. George Money made a conveyance to Miss Marnell of a house and some land at Midnapore. This

property was variously described as of the value of 1219 * 187 rupees — that is, 120*l.* — a year, and as * worth only about 70*l.* a year. On the one hand, it was alleged that this settlement was purely a gift; on the other, that it was partly gift and partly a settlement for consideration. This settlement, as it was alleged, arose in the following manner: —

In 1825, George Money, by means of his influence with the Judges of the Supreme Court, procured for Richard Marnell the appointment of "Counsel for Paupers," which he had himself previously held, but which he then resigned. It was stated that a

¹ *Smith v. Kay*, 7 H. L. Cas. 760.

friendly dispute about some of the fees of this office, amounting to about 1200 sicca rupees, arose between George Money and Richard Marnell, and that at the instance of a mutual friend it was agreed to be settled by presenting the amount to Miss Marnell. In the answer to the plaintiff's bill in Chancery it was alleged that she accepted the money, but immediately afterwards placed the amount in the hands of George Money, who agreed to hold the same for her, paying her interest at the rate of 12 per cent., then the usual rate of interest at Calcutta, and that he did so hold it till the end of 1832. The date of the friendly dispute, or of the gift of the original sum, was not stated. At the end of 1832, George Money proposed to convey to Miss Marnell a house and some land at Midnapore, the value of which was stated to be 10,000 sicca rupees; and the consideration for the conveyance was in part formed of the 1200 sicca rupees and some small amount of interest due thereon.¹ The * deed, however, dated 1st * 188 January, 1833, described the consideration as 10,000 sicca rupees, the receipt for which was indorsed on the conveyance at the time. The plaintiff alleged that Miss Marnell did not enter into possession till 1838. She alleged that she took immediate possession.

Mr. Richard Marnell died in India, and soon afterwards Miss Marnell and Charles Marnell returned to England, Mr. Money also returned here, and those transactions then occurred which afterwards gave rise to the present suit.

In the year 1841, Mr. George Money went to Spain, in order to arrange with the government of that country some plan for the settlement of the claims of the English holders of Spanish bonds.

¹ Mr. Money in his deposition thus denied this allegation made on the part of the defendants: "I never in my lifetime was indebted to the said Louisa Jordan. I forget the year, but I did convey the property situate at Midnapore in the pleadings mentioned to the defendant Louisa Jordan, her heirs and assigns. The value of such property at the time of such conveyance was about 1200*l*. No sum of money was at any time paid for the consideration of the said conveyance by or on account of the said Louisa Jordan, or by the said Richard Marnell and Charles Browne Marnell, or either of them. There was not any sum of money due from me to the said Louisa Jordan at the time of such conveyance. No consideration of any kind or nature soever was ever given for such conveyance, nor were the said Louisa Jordan, Richard Marnell, and Charles Browne Marnell, or any or either of them, in a condition, at the time of the said conveyance, to pay the consideration of 10,000 rupees for such conveyance, or, as I believe, any other consideration than a nominal consideration."

The plaintiff, William Money, then a young man twenty-two years of age, and holding an ensign's commission, apparently under the influence of two persons, one of them named Patrice Gougis, and another calling himself the Marquis de Crouy Chanel, seems to have thought that his father's journey must have a successful result, and that it would therefore be a good speculation to buy up Spanish bonds, which were at that moment very low in the market. Funds were required for this purpose, and the three speculators, together with a man named Hooper, applied to Charles Marnell to assist them. It was arranged that Charles Marnell should advance funds to the amount of 2000*l.* on the following terms. The money was to be raised by the borrowers drawing and accepting, and by Charles Marnell discounting, four bills of *189 exchange, * for 500*l.* each, or, at all events, bills to the amount of 2000*l.*, the parties agreeing that though he was to advance that money, he was to incur no risk, and was to have the option of either taking 30 per cent. upon the loan, or to share the profits. Funds were in fact advanced to the amount of 1200*l.*, but before any further sum was advanced, in the autumn of 1841, Mr. George Money sent word back that his mission had failed. This speculation was, therefore, wholly given up, and Charles Marnell did not advance any more money. The question then arose how the money so advanced was to be repaid, and there appeared to have been some threat of forcing the plaintiff to sell his commission for that purpose, but that was not done, and he ultimately gave the bond and warrant of attorney in question, which was also executed by Hooper.

In the course of Charles Marnell's lifetime, some application was made by him for payment of the money secured by the bond, and George Money, the plaintiff's father, knowing that his son could not discharge the debt, and believing his son to be properly liable for no more than a share of it, offered to pay the sum of 400*l.*, if Charles Marnell would accept that sum in discharge of William Money's liability. The offer was not accepted.

Charles Marnell died on the 29th of January, 1843, having given, by will, all his property to Miss Marnell, his sister, and having appointed her and Mr. George Money his executrix and executor. She, therefore, became entitled to the bond and warrant of attorney, and the money secured thereby. So far there was but little material difference between the parties as to facts. The

suit arose on circumstances which occurred some time after that event.

Miss Marnell was acquainted with the whole of the proceedings with reference to the speculation and the bond and warrant of attorney, while the same were in progress; * and she * 190 repeatedly, as the plaintiff alleged, during her brother's lifetime, expressed to many persons her strong disapprobation of the conduct of all the parties to these transactions, except that of the plaintiff, of whose youth and inexperience, and ignorance of business, she considered unjust and improper advantage to have been taken.

The plaintiff further alleged that from the time of Charles Marnell's death, and even before the death actually occurred, Miss Marnell had repeatedly declared, and sometimes in the most solemn manner, to George Money, to the plaintiff himself, and to numerous other persons, that she had abandoned and never intended to enforce against the plaintiff the claim which she was entitled to make, as her brother's representative, for the debt of 1200*l.*, originally secured by the bond; assigning, as her reasons, that she had never considered the plaintiff liable, in honour or justice, for more than his proportionate share of that sum, and that she was determined to relinquish that share by way of return for the benefits which she had derived from George Money, the plaintiff's father. Messrs. Manning and Dalston acted as her solicitors in all the affairs relating to the probate of her brother's will, and the administration of his estate. The probate duty was originally paid upon the sum of 2000*l.*, under which the estate was sworn in the first instance; afterwards this was increased to 4000*l.*, upon an affidavit sworn by Miss Marnell herself on the 30th of July, 1845; and on the 1st of August, 1845, being subsequent to the date of the respondent's marriage, she passed at the proper office the residuary account of Charles Marnell's estate. The debt of 1200*l.* due upon the bond was not included in the sum of 2000*l.*, under which the probate was first taken out, or in the increased amount of 4000*l.*, or in the residuary account; and no application for payment of any part of this debt was ever * made while Miss Marnell continued unmarried, except * 191 upon one occasion, soon after Charles Marnell's death, when Messrs. Manning and Dalston (without, as it was alleged, any previous instructions from Miss Marnell, though she was sub-

sequently informed of the fact), wrote to George Money a letter, dated the 9th of March, 1843, in these terms:—

“The arrangement proposed by you and your son, in the lifetime of Charles Marnell, will be accepted by Miss Marnell, and on payment of the 400*l.* in cash, and the bond as agreed to be given up for the balance, your son can be acquitted of this claim. Will you be kind enough, therefore, to favour us with an early appointment for concluding this matter?”

To which Mr. Money replied as follows:—

“I have to acknowledge the letter of your firm, of yesterday’s date; in answer to which, I beg to say, that the offer I made respecting my son was, when I made it, rejected. Circumstances are now greatly changed as to all the parties concerned, and I do not feel inclined to make the offer again.”

The plaintiff left the army in 1843, with the intention of going to the bar, to which he was called in due course. In 1845 he became engaged to be married to his present wife, then Miss Eleanor Poore, daughter of the late Sir Edward Poore, of Cuffnells, near Lyndhurst, baronet. The plaintiff, having no property of his own, and being dependent upon his profession, and upon what he might receive from his father after his decease, it was at first arranged that his marriage should be postponed for two years. The plaintiff informed his intended wife, and Lady Poore, her mother, of the circumstances under which he had become liable for the debt of 1200*l.*, and of the kindness of Miss Marnell *192 to him, in promising not to enforce that liability;¹ and immediately on his engagement being formed, he wrote her

¹ In order to show the probability of the abandonment of the claim, evidence was given that Miss Marnell, who was much the senior of the plaintiff, had always treated him as a lady would treat an adopted son. One letter particularly was much relied on, because of its very familiar character, and because after telling her of Messrs. Manning and Dalston’s application for the 400*l.*, and of his father’s answer thereto, he acknowledged the receipt from her of a post-office order, which showed that she sometimes even supplied him with money. The letter, which was dated 11th March, 1843, told Miss Marnell of the letter of Manning and Dalston, and of his father’s answer thereto, and concluded thus: “I got your post-office order, which made me very angry with you; but, as I suppose the postman will not take a kiss, I must keep it for yourself till you come back. God bless you, my own true Tooney. Write to me oftener, for you know I have not much time to answer your letters; so you ought not to make me wait for want of an answer. So Mrs. no kissum, kissum: never mind, I think oo bring me one. — Your loving boy, Willy.”

a letter (28th June, 1844), informing her of his intended marriage, and also stating that he had told both Lady Poore and Miss Poore of "all her various kindnesses to him."

During the negotiations and arrangements which took place after the date of this letter, with a view to the solemnization of the marriage, and to the execution of a proper settlement thereon, it was considered necessary, both by the plaintiff and his family, and by Lady Poore, on behalf of her daughter, that the plaintiff should be made secure against any future demand for payment of the debt of 1200*l*. Conversations took place with Miss Marnell which were spoken to by various witnesses examined on behalf of the plaintiff.¹

¹ Mrs. Pulcherie Money, the plaintiff's mother, deposed thus: "In August or September, 1844, I had a conversation with her on the subject of the said bond and my son William Money's then intended marriage, when I said to her, the said Louisa Jordan, 'You have long given up the debt, so it's only a nominal thing; and it's no use your keeping a paper you have long since promised you would never enforce.' She replied, 'I will be trusted.' To which I said, 'Who talks of not trusting you? But you may marry, and then you would be at the command of your husband.' She then said that she wanted to keep the bond, in case she could ever use it against Hooper. I replied, 'If you will give it to me, I shall insure it never can be used against William, and I promise to return it to you if ever you require to use it against Hooper.' To this she said: 'I give you my word of honour that I will never use it against William; but I will be trusted, and I will keep it. Besides' (she added), 'you know very well that I have made my will, and that William is heir to every sixpence I have got; and after my death he will find that bond among my papers, and he may burn it or do with it what he likes.'"

Mr. George Money deposed thus: "Shortly before the marriage of the plaintiff, I had a conversation with the defendant, respecting the then intended marriage of the plaintiff, and his interests; and on that occasion I said to her, that I had given up the property at Midnapore to her, without any consideration or sum of money for it; and that as the plaintiff was about to be married, I should settle the property at Midnapore on the plaintiff, unless the defendant wholly relinquished all claim on the plaintiff for or in respect of the said debt to Charles Browne Marnell; and she in reply said: 'No, don't do that; I will never make any claim on your son William in respect of that debt, if you will let me remain in possession and enjoyment of the Midnapore property.' And I say that it was, on the occasion of that interview, agreed by and between the defendant, Louisa Jordan, and myself, that in consideration of my permitting her to continue in the possession and enjoyment of that property, she should and did wholly abandon the said debt. And I say that such conversation had reference to the marriage of the plaintiff. And I say that at that time, or soon afterwards, I had a conversation with the defendant, Louisa Jordan, respecting any marriage she might contract. I say that she, on that occasion, repeated her desire to have the mat-

*193 *On the part of the defendants an answer was put

*194 *in, denying in positive terms that there had been any

ter so settled, that any husband she might marry should have no claim on the plaintiff, and that she then repeated to me, that in consideration of my having allowed her to continue in the enjoyment of the Midnapore property, she had wholly abandoned the said debt, and that she would never make any claim in respect thereof against the plaintiff."

He further said: "I then (namely, after the conversations with the appellant Louisa, already set forth) informed the plaintiff of the particulars of the said agreement with the said defendant, Louisa Jorden, and told him that he might safely marry; and that the said alleged debt due to the said defendant, Louisa Jorden, as executrix of the will of the said Charles Browne Marnell, was wholly abandoned. And I say that in consequence of such agreement with the said Louisa Jorden, I omitted to make, and did not make, any settlement of the property at Midnapore upon the plaintiff upon the occasion of his said marriage."

Lady Poore in her deposition said: "A settlement was executed on the marriage of my daughter with the plaintiff in August, 1845; the first life interest in the property of my daughter was settled on the complainant by such settlement. I had, on various occasions previous to the complainant's marriage with my said daughter, heard of the bond in the pleadings mentioned, and the particulars connected therewith, and of the abandonment of the debt in such bond mentioned. I first heard of such abandonment of the said debt from the complainant, and afterwards from his brother, George Money; and I spoke to the complainant's father on the subject, who informed me that the said debt was entirely at an end, and that the said Louisa Jorden had given up or abandoned the said debt in consequence of the kindness the said George Money, the father, had shown to the said Louisa Jorden and her brother when they were in India; and I was so informed as aforesaid by the aforesaid persons at my residence at Cuffnells, and afterwards at Whetham, in the county of Wilts, the residence of the said George Money, the father. The complainant did marry on the faith of the abandonment of the said debt, as I knew from the statements he and his father and brother made to me at the time, and previously to the preparation of the said settlement; and it was on the faith of the said debt being so abandoned that I consented to the first life interest in the property of my said daughter being settled upon the plaintiff as aforesaid; and I would not have permitted such settlement to be executed if I had not confided in such abandonment."

Other witnesses were called to support the plaintiff's statement, that this claim against him had been actually abandoned by Miss Marnell. Extracts from the depositions of a few of them (relating to conversations which took place before Miss Marnell's marriage with Mr. Jorden) are here given:—

Mrs. Amelia Harden deposed: "Louisa Jorden did frequently mention to me, that her dear boy William Money would never be called upon to pay a penny on account of some bond which she stated had been given for 1200*l*. I have frequently heard Louisa Jorden say that the debt was gone and was abandoned by her, saying that she should never call upon him, or suffer him to be called upon, for any part of such debt."

Elizabeth Mead, who had been in Miss Marnell's service in 1843, deposed:

*abandonment of the debt, or any contract to abandon *195 it.¹

"Louisa Jorden has repeatedly, but I could not say how often, declared in my presence that Mr. William Money's debt was gone and abandoned, and I have heard her say so to almost every one who came to see her; and I have heard her make these declarations in the following terms: She said to me two or three days after Mr. Charles Marnell's death, 'Well, I have got that cursed bond; so William is safe: he shall never pay one farthing.' And she has stood in the middle of the room and clenched her fist, and said, 'He shall never pay one farthing of that bond: so help me God!' And I say that the bond as a debt was the subject of her daily conversation, and she often awoke me at night to speak of it, and she always spoke of it in the same way, namely, that it had been given up when her brother died, and the debt abandoned. About six months after the death of Mr. Charles Marnell, Miss Marnell was staying at No. 5 Harley Street, and one night she burnt a roll of papers in my presence, and said, 'There is an end of the bond; I have burnt it'; and I verily believed it was destroyed; and Louisa Jorden afterwards told me that the reason that she had not destroyed the bond long ago, was that her solicitor, Mr. Manning, advised her not, because she might recover from Mr. Hooper the debt, or his part of it; and she often stated to me before that day, that Mr. William Money was as secure as if the bond were de-

¹ The chief evidence given for the defendants was that of Mr. Dalston, the solicitor: it was much relied on by Lord Cranworth when the case was before the Lords Justices. It was as follows: "I called on the plaintiff at his chambers in the Temple, on the 14th of December, 1849, in consequence of a letter I received from him, appointing me to do so. On my entering the room, he directed his clerk to go to his brother George Money, and tell him I was there, and ask him to come to him; which said George Money very shortly afterwards did. A conversation to the following effect then ensued between us; namely, the said plaintiff stated to me that Charles Marnell was a partner with him, said plaintiff, a Mr. Hooper, and others, in a speculation in Spanish stock or bonds, and that he (Marnell) was to find, and had in fact found, the money; that after having been first repaid his advances, he was to have a share of the profits, or a heavy percentage on his money, at his option; that he was to be repaid his money in any event; that the speculation had failed, and that the money had all been lost, and that said plaintiff was only bound to pay his share. I said, 'I am told that you offered Mr. Jorden (meaning said defendant, William Prue Jorden) 300*l.*, whereas, according to your statement, your share would only be 240*l.*' To which plaintiff replied, 'Yes, but I wished to act liberally by Mr. Jorden. Plaintiff, or his brother George, and I rather think the latter, then said, 'Are you aware, Mr. Dalston, that Miss Marnell gave up this debt to my brother?' and upon my replying in the negative, the same speaker replied, 'She has done so over and over again.' I said that I had never heard so, nor, except as he then told me, had I ever any reason to suppose so: and I asked said plaintiff, if that were so, why he had offered to pay Mr. Jorden 300*l.*, or, what was the same thing, to get his father to leave Mrs. Jorden 300*l.*, in satisfaction of the judgment, al-
luding to the judgment in the pleadings of this cause mentioned. To which

*196 *The cause was heard before the Master of the Rolls, who, on the 9th February, 1852, granted an injunction to

stroyed. I heard Miss Marnell speak of a marriage intended between Mr. William Money and a daughter of his uncle William; and she was very angry at such intended marriage, and she said these words, or something like it, 'I've given him up the bond, so I can't help it, but I will leave all I have to George; and if he don't use me well, I will leave it to one of Mr. Money's other sons, to pay the debt of gratitude I owe to their father.' I was present at a meeting between Miss Marnell and Mr. George Money about the 28th day of January, 1843, at No. 14 Bedford Square. I went by her request to Bedford Square, at two o'clock, and found them together in Mr. Charles Marnell's room, where Mr. Charles Marnell was lying in a dying state (he died next day). The said Louisa Jorden, at four the same afternoon, said to Mr. Money, while they were standing at the bottom of the bed, and I at the top, fanning Mr. Charles Marnell, 'George Money, if Charles has left me his property, William shall never pay one farthing of that bond; it was a most unjust transaction on the part of Charles.' And the said Louisa Jorden assigned Mr. Money's kindness in India as a consideration for abandoning the debt. I have heard her say that the said debt was irrevocably gone, and that it was cancelled, and she used many similar expressions; and the morning of Mr. Charles Marnell's death she said to me, while he was lying speechless, that his apoplectic fit was a judgment on him for swindling William, and that

plaintiff replied, 'That he had made that offer for the satisfaction of his mind, as he was anxious to pay his share of the money.' Plaintiff likewise stated, in the course of said interview, that Richard Marnell had gone or ran away from his creditors in India, and that his (plaintiff's) father had compromised Richard Marnell's debts, amounting to 8000*l.*, for 2000*l.*, and had paid that sum out of his own pocket, and that it had never been repaid to him; that his, said plaintiff's, father, had given the Midnapore property (alluding to the Midnapore property in the pleadings of this cause mentioned) to Miss Marnell; and as that was a mere voluntary conveyance, he said plaintiff would, if said judgment were enforced against him, sell the said property, and with the proceeds pay what he was called upon for on the said judgment. Upon which I said, that all I had then heard from plaintiff and his brother was entirely new to me, but that I would report what he said to my clients, Mr. and Mrs. Jorden; that it was their intention to have the judgment revived at all events, but that I had no instructions to act upon the judgment in any way beyond restoring it to a proper state as a subsisting judgment, and that my object in seeking an interview with said plaintiff was to ascertain if it could be revived in any way by consent or otherwise at the least possible expense. Plaintiff replied that he should not consent, but should oppose the revival of said judgment, and that he would file a bill in chancery and protect himself against it, on the grounds of its having been a partnership, and of his youth and inexperience at the time he executed the bond and warrant of attorney, and of Mrs. Jorden's having given him up the debt. This is the substance and effect of what passed at said interview respecting said judgment and Midnapore property, and I have repeated the expressions used by the parties on that occasion as nearly as my memory serves me."

* restrain the defendants from enforcing the judgment on *197 the warrant of attorney. The case was taken by appeal

he was a villain, and had made Mr. William Money responsible for it, because he thought Mr. George Money would pay it; and I have repeatedly heard the said Louisa Jorden say to Mr. George Money, when he complained of his son's imprudence, 'You ought not to blame Willy so much, because he was the dupe of swindlers, and Charles Marnell did not act as he ought to have done'; and she repeated the expression of 'Mr. William not paying, and the transaction being unjust,' to Mr. George Money, several times during the evening of the 28th January, 1843. Miss Marnell wrote a letter to Mr. William Money in my presence the day after Mr. Charles Marnell's death; and she said to me, before the writing of such letter, 'I will set Willy's heart at rest; he shall have no more trouble about the bond.' And after writing such letter she said, 'There, I have set his heart at rest.' She either read or told me the contents of that letter, and I am certain that the contents were, that the debt was absolutely abandoned, and that Mr. William Money was to come to London to the funeral; and the letter was taken to the post, directed to Mr. William Money at Brighton; and Mr. William Money came to London in consequence of such letter. I was present at the meeting of Miss Marnell with Mr. William Money, and the first thing that Miss Marnell said when Mr. William Money came in, was, 'I have found that bond, and you are safe.' Mr. William Money kissed her, and said, 'Thank you; you have always been very kind to me.' And Miss Marnell, in the conversation, referred to Mr. George Money's kindness to her in India as a consideration for abandoning the said debt. I have heard Mr. William Money's brother, George Henry Money, ask Miss Marnell why she did not release the said debt which had been abandoned at Mr. Charles Marnell's death; and she said she could not execute a release to Mr. William Money without releasing Mr. Hooper, and that she must keep the bond to sue Mr. Hooper; and Mr. William in conversation with Miss Marnell always treated the said debt and spoke of it as abandoned at Mr. Charles's death, and used to say the bond was just as safe in Miss Marnell's possession as if it was destroyed."

Miss Emma Davis deposed: "I was never present at any meeting between the said Louisa Jorden and Mr. Dalston, but I was present at two meetings between the said Louisa Jorden and Mr. Manning, and both such meetings were at the office of Mr. Manning; and the first of such meetings was when I accompanied the said Louisa Jorden to the office, about ten days after the death of Charles Marnell; and I say that the said Louisa Jorden said, on entering with the said Mr. Manning, 'Well, Mr. Manning, I want you to give me up that bond; I wish to give it up to the dear boy, as I have abandoned the debt to him and his father; I want him to feel happy about it.' And Mr. Manning replied: 'No, no; not yet, at all events; we may yet recover something from Hooper.' And he, Mr. Manning, then turned the conversation. And I say that about six months afterwards I again accompanied the said Louisa Jorden to Mr. Manning's office, and we went into his private room; and the said Louisa Jorden said: 'Good morning; I have come again about that bond; I want to give it up to him, and make the dear boy happy; it is of no use my giving him the copy I have, as long as you have the original, for you know I have abandoned the debt.'

- * 198 * before the Lords Justices, who, on the 29th May, 1852, delivered judgment. Their Lordships differed in opinion.
- * 199 * Lord Justice Knight Bruce concurred with the Master of the Rolls, and Lord Justice Lord Cranworth thought that the order of his Honour must be reversed. (2 De G., M. & G. 318.) The order made at the Rolls continued, therefore, to stand, and this appeal was then brought.

Mr. Rolt and *Mr. Willcock* (*Mr. White* was with them) for the appellants. — There is not here any contract to abandon the debt : there is nothing to constitute a legal bar to the appellants putting the bond in suit, and, if so, there is no equity that can be set up as a bar to their legal rights. *Wekett v. Raby*¹ does not apply to this case, for there the original obligee had in terms created

* 200 in his devisee a trust to deliver * up the bond as soon as he was dead. The principle that must govern this case is laid down in *Cross v. Sprigg*,² where Vice-Chancellor Wigram held that merely voluntary declarations, indicating the intention of the testator to forgive or release a debt, if they are not evidence of an actual release at law, do not constitute a release in equity, which, without some ground of distinction, will follow the law. *Ashton v. Pye*³ is to the same effect. There is no such ground of distinction here. In *Richards v. Syme*,⁴ though the words were much stronger than they are here, for if they had really been uttered they amounted to a legal, and not merely to an equitable discharge

And the said Mr. Manning said, 'Patience, patience, my good lady ; I will talk to you about it in a few days.' And he again turned the conversation. And we came away in a cab ; and I said, 'I do not think Mr. Manning likes you to give up that bond.' And the said Louisa Jorden replied, 'Well, well, child, it does not signify : nothing can be done without my sanction, and he knows I have given up the debt.' And the said Louisa Jorden gave me to understand that she would defy Mr. Manning to keep the bond, as she had given up the debt."

Mrs. Sarah Cooper. deposed : "She often told me that the debt which the plaintiff had owed her brother was abandoned and gone ; that she had freely forgiven him the debt since her brother's death. On one occasion, some years ago, I asked her how Mr. William Money was. She said that he had not been to see her for some time ; that she thought he ought to do so, as she had been very kind to him, and had forgiven him the debt which he owed her brother, and which she told me was some hundreds ; and she added that she believed he, the plaintiff, was going to get married to a rich young lady."

¹ 2 Brown, P. C. 336.

² 6 Hare, 552.

³ 5 Ves. 350, note.

⁴ 2 Eq. Cas. Ab. 617.

of the debt, the Court would not release the debtor, but directed an issue. In *Reeves v. Brymer*,¹ under what were considered very hard circumstances, an issue was permitted. In *Byrn v. Godfrey*² there was, what there is here, a statement made the day before the death, that the obligor would not call for payment; but it was held that that was not effectual as a release of the debt, which therefore was held to be part of the assets. In *Eden v. Smyth*³ the same course was pursued; and Vice-Chancellor Wigram, in *Cross v. Sprigg*, said that the only case which had made him doubt at all upon the subject was that of *Flower v. Marten*,⁴ where it was supposed that Lord Cottenham had intimated his opinion that when a creditor by his conduct showed an intention to abandon his rights as a creditor, and treat the debt as a gift to the debtor, equity would not permit the debt to be enforced. Vice-Chancellor Wigram, however, expressed his doubts whether Lord Cottenham could ever * have laid down such a doctrine. If * 201 the supposed promise not to sue is to be considered as a contract made in contemplation of marriage, and therefore enforceable against the person who made the promise, then it is a promise which ought to have been in writing; otherwise it is simply void under the Statute of Frauds. The defendants can make that defence without specifically pleading it. The pleadings here, by denying that there was any such contract or agreement, raise the question of its validity under that statute.

[LORD BROUGHAM. — Must not the Statute of Frauds be distinctly pleaded? The Statute of Limitations must.⁵]

The difference between the two cases is, that in the one the agreement is admitted, and the remedy only barred; in the other the agreement is denied. The denial of an agreement includes the denial of its legality for want of writing: *Buttemere v. Hayes*.⁶ The burden of proving a legal agreement lies in equity, as at law, on those who set it up. A specific performance of a parol agreement, although the agreement is admitted by the answer, cannot be decreed if the defendant insists upon the Statute of Frauds: *Cooth v. Jackson*; ⁷ and in the same case Lord Eldon laid it down, that in equity the denial by the answer of a parol agreement,

¹ 6 Ves. 516.

² 4 Ves. 6.

³ 5 Ves. 341.

⁴ 2 Mylne. & C. 459.

⁵ 2 Wms. Saund. 63, n. 6.

⁶ 2 M. & W. 456.

⁷ 6 Ves. 12-37.

which is within the Statute of Frauds, is conclusive, and that against the answer there can be no decree upon the testimony of a single witness, unless supported by special circumstances.¹ *Skinner v. M'Douall*² does not impeach that doctrine, and may indeed be considered an erroneous decision, for it treats a plea that there is no sufficient agreement in writing, as a plea which does not set up the Statute of Frauds. *Ridgway v. Whar-*

* 202 *ton*³ * decides that where a defendant denies, or does not admit, an agreement, he need not plead the Statute of Frauds.

[LORD ST. LEONARDS referred to *Clinan v. Cooke*.⁴ — THE LORD CHANCELLOR. — They did not rely on the Statute of Frauds in the answer in that case. The question was as to the admissibility of parol evidence to connect one writing with another.]

The answer here expressly denies any agreement, and against that answer a Court of equity will not act merely on the evidence of a single witness: *Evans v. Bicknell*.⁵ Here there is nothing to support the allegation of an agreement but George Money's evidence; and on the rule now stated, that evidence is insufficient for such a purpose. Besides which, his evidence is not only not supported, but it is in many respects contradicted by other testimony, and by the probabilities of the case.

As to the evidence of what was said by Mrs. Jorden, it is clear that the debt was always spoken of as a subsisting debt, but an intention was declared not to distress the respondent by enforcing it. That such intention existed at the time, there can be no doubt; but to abstain from distressing a debtor by enforcing payment at a particular time, does not amount to an abandonment of the debt itself. From the beginning, the retention of the bond was insisted on, and every application to Mrs. Jorden to give it up was peremptorily refused. There is not here any such promise of benefit as existed in the case of *Maunsell v. White*,⁶ where the statement of the person from whom the benefit was expected was, at his desire, communicated to the guardians of the lady. Yet

* 203 in that case this House held that representations of intention did not amount to a * contract binding on the party who made those representations. Even where there

¹ 6 Ves. 39, 40.

² 2 De G. & S. 265.

³ 3 De G., M. & G. 677.

⁴ 1 Sch. & L. 22.

⁵ 6 Ves. 174.

⁶ 4 H. L. Cas. 1039.

has been a will containing a gift of a legacy, it has been held, that though such gift may release a debt, it can only do so by the clear expression of a distinct intention to that effect: *Wilmot v. Woodhouse*.¹ There is no such clear expression of intention here. On the contrary, the declared intention was to keep the bond and the legal rights attached to it, though not to distress the respondent by enforcing them. [They referred throughout very fully to the evidence.]

Mr. Roundell Palmer and *Mr. Bates* for the respondents. — There is ample evidence here that what passed between these parties was more than a mere declaration of an intention not to press for the payment of the bond: it was a declaration of an actual abandonment of the bond, and that declaration was made with the knowledge that it would affect, and with the object that it should affect, the conduct of parties about to contract marriage. The evidence of *Mrs. Jordan* is plainly that of a person with a confused and bad memory, and who acted on momentary impressions, and whose recollection of what she said and did at different times is not at all to be relied on. It is not necessary, in order to bring a case of this kind within the authority of *Flower v. Marten*,² that the renunciation of legal rights should have been made at the creation of the instrument: it is sufficient if they take place afterwards, and arise from the course of conduct of the party, which is such as to induce other parties to enter into engagements into which they would not have entered but for that renunciation.

[LORD ST. LEONARDS. — That was a dealing between father * and son: no other person was interested. The father made * 204 two other persons depositees of the bond, and gave them power to put an end to it. Though they had not exercised that power, yet, as the father, because he was satisfied with his son's conduct, had not called for the bond and enforced it, Lord Cottenham thought there was an abandonment of the claim upon it. THE LORD CHANCELLOR. — But there the bond was, or not, to be enforced, as circumstances might make the father think fit. He authorised certain persons to say that the bond should not be enforced, but he reserved to himself the right to enforce it, though he never used that right. LORD ST. LEONARDS. — The trustees had not returned the bond, nor had the father demanded it. Lord

¹ 4 Brown, C. C. 227.

² 2 Mylne & C. 459.

Cottenham could not consider that the Lord Chancellor could exercise a power supplementary to that of the trustees and of the father. If he did, I should doubt the soundness of the doctrine. The ground on which the decision can be supported is, that the father kept the bond as a check on the conduct of the son, which he might apply in case of necessity. As that necessity did not arise, the Court did not treat the bond as still operative. There was no declaration by the father that he had abandoned the bond : it was only his general conduct that showed him to have done so.]

That case proves that the fact of a legal debt existing does not inhibit equity from interfering to prevent its enforcement ; and it also shows that if the debt is created or kept alive for a specific purpose, which becomes exhausted, equity will, under such circumstances as existed there, confine its application to that specific purpose. Here the declarations were that the bond was kept solely for the purpose of being enforced, if possible, against Hooper.

Under the circumstances which exist here, equity ought
* 205 * to confine the holders of it to that purpose : *Major v.*

Major.¹ To allow the respondents here to do more, would be to contravene the principle of the decisions in *Neville v. Wilkinson*² and *Montefiori v. Montefiori*,³ in the latter of which Lord Mansfield said, that " No man shall set up his own iniquity as a defence any more than as a cause of action." *Scott v. Scott*⁴ has fully adopted that principle, and so has *Doe d. Roberts v. Roberts*.⁵

[LORD BROUGHAM. — In *Major v. Major* there was an indorsement on the bond. It had been originally said that it was not to be enforced unless the obligees came to want ; and afterwards there was an indorsement, signed by two of them, " that this bond is never to appear against the obligor " : that indorsement had a great effect on the mind of the Vice-Chancellor.]

Of course it had, as it removed all doubt as to the fact of what was done and intended when the bond was executed. But the judgment there proceeded on the well-recognised principles of equity, and not on that indorsement, the effect of which was held to be matter of law ; but the general circumstances of the case were held to raise an equity sufficient to restrain the enforcement of the bond.

¹ 1 Drewry, 165.

² 1 Brown, C. C. 543.

³ 1 W. Bl. 363.

⁴ 1 Cox, 366.

⁵ 2 B. & Ald. 367.

[THE LORD CHANCELLOR. — There can be no doubt about that decision. The bond was not to be enforced if certain circumstances did not arise, and they did not arise.]

The absence of any written contract in this case is occasioned by the circumstance that Miss Marnell was offended at not being trusted. The respondent married in 1845: his mother-in-law, in the belief that he was free from this bond, a belief occasioned by the continued representations * of Miss Marnell, * 206 made over to him a part of her own life interests, and while Miss Marnell remained unmarried she never thought of enforcing the bond.

The only difficulty with one Judge in the Court below seemed to be as to the fact of an abandonment; but the evidence here was sufficient to prove that fact. It is a mistake to say that the only evidence in contradiction to the answer is that of Mr. Money the elder. It is, however, not true, that there is any such absolute rule as that the answer is to be treated as conclusive if there is but the direct testimony of one witness against it. The true rule is, that other circumstances are to be considered, and if they support the testimony of the one witness, then the answer is overruled: *Walton v. Hobbs*,¹ *Cooth v. Jackson*.² In *Keys v. Williams*,³ that doctrine was acted on. There a letter was produced, which supported the testimony of the single witness who contradicted the answer, and the Court acted on the evidence, and not on the answer. Here the answer contains many statements that are undoubtedly erroneous, while the evidence of Mr. Money is supported by a great deal of other testimony, and by the probabilities of the case, and the testimony must therefore prevail over the answer.

The objection as to the Statute of Frauds is for the first time raised at the hearing at the bar of this House. It was neither pleaded in the answer, nor argued in the Court below.⁴ The first question on this point is, whether this is a case in which the Statute of Frauds applies at all. The respondent relies on two grounds of equity; first, that there having been an assurance of the creditor that the bond should not be enforced, a marriage * took place on the faith of that assurance. The * 207 Statute of Frauds cannot apply to such a case.

¹ 2 Atk. 19.

² 6 Ves. 12, 40.

³ 3 Younge & C. Exch. 55

⁴ See *Withy v. Mangles*, 10 Clark & F. 215 — 236.

[THE LORD CHANCELLOR. — It does not apply if the party was led into the marriage by a misrepresentation of fact; but the question is, whether, when the creditor says, “I have abandoned” (supposing her to have said so), she means more than “I will not enforce”; and then the further question is, whether that is not a contract to which the Statute of Frauds is applicable.]

It is not: the statute says, “nor upon any agreement made upon consideration of marriage.” This was not so made: it is a promise with reference to a marriage, a promise of a creditor not to enforce a claim; but it is not a promise the consideration of which, in the legal sense of the words, is a marriage. This is a moral equity, which Courts of equity will enforce, for they will not allow one party to mislead another, especially so as to induce that other to enter into the irrevocable contract of marriage upon a false representation. *Neville v. Wilkinson*,¹ and *Harrison v. Cage*,² in the latter of which it is stated, that, “Northey said at the bar, that the statute intended only agreements to pay marriage portions, and that it had been often so ruled by Holt, C. J. *Quod Holt non negavit*.”

[THE LORD CHANCELLOR. — That cannot be true. It cannot be to pay marriage portions; it may be to enter into marriage settlements.]

That is no doubt its real meaning. *Prodgers v. Langham*³ shows that a promise irregular, and even fraudulent, as against a purchaser before marriage, becomes by the fact of the marriage valid. *Kirk v. Clark*,⁴ which was recognised in *Brown v.*

* 208 *Carter*,⁵ establishes that * so far as relates to the agreement being founded on the promise of Mr. Money not to disturb the settlement of the Midnapore property, he thereby made the previous voluntary settlement of that property valid, and so gave to Mrs. Jorden a valuable consideration for her abandonment of the right to sue on the bond. This arrangement between these two parties cannot be affected by the Statute of Frauds.

But further, the statute cannot be relied on, for it is not pleaded: *Cooth v. Jackson*,⁶ where it is said: “If the defendant does not

¹ 1 Brown, C. C. 543.

⁴ 1 Prec. Ch. 275.

² 1 Ld. Raym. 887.

⁵ 5 Ves. 862.

³ 1 Sid. 133.

⁶ 6 Ves. 12 – 39. See Lord Tenterden’s observations in *Lysaght v. Walker*, 2 Dow & C. 225.

say any thing about the statute, he must be taken to renounce the benefit of it." A defendant who intends to rely on the statute must in equity give notice to his opponent of that intention, otherwise, though he may in his answer admit the agreement, if he afterwards sets up the statute as a bar to relief, he admits nothing. There are besides various equitable circumstances which will avoid the statute. There is in equity no distinction between pleading the Statute of Frauds and the Statute of Limitations. A defendant who has answered, cannot have the benefit of the Statute of Limitations at the hearing, unless he has insisted on it in his answer. *Harrison v. Borwell*.¹ It is the same with the Statute of Frauds.

Mr. Rolt replied.

July 7.

THE LORD CHANCELLOR, after very fully stating the facts of the case, and observing that though for convenience' sake he should speak only of the bond, his observations must be taken to apply equally to the warrant of attorney, proceeded thus : —

The first question we have to consider is, whether the * bond was a valid security, because though it has not been * 209 actually argued that it was not, yet a good deal of discussion took place upon the question of this bond with a view to show that the plaintiff had been induced by Charles Marnell improperly to execute it, and that in truth he ought never to have been liable for the sum for which it was given. On that point not much reliance was placed, but I ought, perhaps, to say that I do not entertain a doubt that, at all events for the purpose of this suit, it must be treated as a valid bond.

The transaction which gave rise to the bond was unquestionably one of a very doubtful character ; but however hard the terms on which the money was obtained might be, they were perfectly lawful terms, which the parties being all *sui juris*, and upon an equal footing, could accept or refuse. I may stipulate what I choose, though I cannot thereby absolve myself from liability to third persons. I may stipulate with another, if I like to do so and he likes to agree, that I will advance 1200*l.* upon a speculation upon the terms, that at all events he is to pay me 1200*l.* with interest ; that if there is profit, I am to have a share of that profit, and if there

¹ 10 Sim. 382.

is a loss, he is to bear the loss ; or upon any other terms between ourselves for which we may choose to stipulate. I do not inquire into the relations of these persons as between themselves and third parties. However, whatever the terms were, the bond and the warrant of attorney were given, and being given, William Money thinks that there is something afterwards to affect his liability to Charles Marnell as to the payment of the 1200*l*.

I had occasion, being one of the Lords Justices when the case was considered upon appeal, to look into the matter very attentively, and I have again done so on this occasion. What-
 * 210 ever defects there may be in my judicial character, * the being too confident in my own opinion is not one of them, perhaps the reverse ; but having again examined the matter, I cannot arrive at any conclusion different from that at which I arrived when the case was before me in the Court below.

There are two grounds upon which it is said that the parties have lost their right to enforce the bond. The one is, that previously to William Money's marriage, Mrs. Jorden, then Miss Marnell, represented that the bond had been abandoned, that she had given up her right upon it, and upon the faith of that representation the marriage was contracted. And then it is said that upon a principle well known in the law, founded upon good faith and equity, a principle equally of law and of equity, if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. That is a principle of universal application, and has been particularly applied to cases where representations have been made as to the state of the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. There the person who has made the false representations has in a great many cases been held bound to make his representations good. A leading case, *Neville v. Wilkinson*,¹ upon that subject, which has been referred to, came before Lord Thurlow. In that case, Mr. Neville, the son of Lord Abergavenny, was in treaty for a marriage with the daughter of a very rich person, a gentleman of the name of Robinson. The father of the young lady, it seems, was anxious as to the property, know-

¹ 1 Brown, C. C. 543.

ing that Mr. Neville, the intended husband, was a young man * of expensive habits, and that he was involved in * 211 considerable debts, and Mr. Neville, in order to quiet Mr. Robinson's mind, induced Wilkinson, the defendant, who was his principal agent, to make out a schedule, and to state it to be a schedule of all the debts to which Mr. Neville was liable. Mr. Wilkinson did so, and he represented that a sum of 18,000*l.* was the amount of all Mr. Neville's debts, concealing, at the instance of Mr. Neville, from Mr. Robinson, the fact that besides the 18,000*l.*, Mr. Neville was really indebted to Wilkinson himself, and another person, in a further sum of nearly 8000*l.*, making 26,000*l.*, instead of 18,000*l.* Upon that representation the marriage took place, and provision was made for the payment of the 18,000*l.* debts, and then Mr. Robinson thought that his daughter was marrying a person who was free from debt. Afterwards Mr. Wilkinson sought to enforce his own claim of 8000*l.*, and Lord Thurlow said that he could not do that; he had represented that there was not any sum of 8000*l.* due to him, and upon the faith of that representation the marriage had been contracted, and he could not be suffered to say that that which he had thus represented was a falsehood, and now to proceed upon the truth.

That was, in truth, a decision which was exactly in conformity with what had been previously decided by Lord Mansfield, in the case of *Montefiori v. Montefiori*.¹ In that case Joseph Montefiori, being about to contract marriage, induced his brother Moses to give him a note for a large sum of money, as the balance of accounts between them, which balance Moses acknowledged to have in his hands, though, in truth, no such balance, or any thing like it, existed. The marriage took place upon the faith of that representation. Moses afterwards sought to get back the * note, and the matter was referred to arbitration. The * 212 arbitrators awarded the note to be given up, but the matter was brought before the Court of King's Bench, and Lord Mansfield said: "No, it shall be as you represented it to be. No man shall set up his own iniquity as a defence, any more than as a cause of action."

There had been a much earlier case of *Gale v. Lindo*,² where just in the same way a person, in order to make it appear that his sister had a fortune of 500*l.*, whereas, in truth, she only had 350*l.*,

¹ 1 W. Bl. 363.² 1 Vern. 475.

gave her a sum of 150*l.*, so as to make up the 500*l.*, and she gave him a bond for the amount. After the marriage had taken place upon the faith of that, it was held that the bond could not be enforced, and it was ordered to be delivered up to be cancelled.

These principles are plainly and perfectly intelligible, and quite consistent with good sense, and I should be in the last degree sorry that any opinion or decision to which I am a party should lead to a notion that I, in the slightest degree, question their propriety. Nay, more, I think that the principle has been carried, and may be carried, much further ; because I think it is not necessary that the party making the representation should know that it was false ; no fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterwards come to him to make it good.

* 213 The whole doctrine was very much considered at law, * for it is a doctrine not confined to cases in equity, but one that prevails at law also ; and there are, in fact, more cases upon the subject at law than in equity. It was much considered in the case of *Freeman v. Cooke*.¹ There had been a previous case in the Court of Queen's Bench, of *Pickard v. Sears*,² in which the doctrine had also prevailed. I shall shortly refer your Lordships to what fell from Mr. Baron Parke, who after great consideration amongst all the Judges of the Court of Exchequer (to which I can speak from personal knowledge) delivered judgment in *Freeman v. Cooke*. I need not refer to the particular facts in that case ; it was a case where, upon the sheriff seizing goods, a party had made certain representations as to the ownership of them, and the question was, whether he was estopped from disputing the truth of what he had so said. Mr. Baron Parke says :³ "The estoppel therefore, if it be one created by the conduct of the bankrupt in this case, is not opened by the omission to plead it ; and the only question is, whether it be an estoppel ? It is contended that it was upon the authority of the rule laid down in *Pickard v. Sears*.

¹ 2 Exch. 654.

² 2 Exch. 662.

³ 6 A. & E. 489.

That rule is, 'that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' That was founded on previous authorities in the cases *Greaves v. Key*, *Hearne v. Rogers*, and has been acted upon in some cases since. The principle is stated more broadly by Lord Denman, in the case of *Gregg v. Wells*, where his Lordship says that a party who negligently or culpably stands by and allows another to contract on the * faith of a fact which he can contradict, * 214 cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving" (I must beg leave, by the way, to say that I think that this is stated a little too broadly). "Whether that rule has been correctly acted upon by the jury, in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard v. Sears*, must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

My Lords, I believe that the rule of law, which, as I have more than once said, is a rule founded upon perfectly good sense and is intelligible to every capacity, is illustrated by what then fell from Mr. Baron Parke, as well and as accurately as in any of the cases upon the subject. The question is, whether the evidence here shows that any thing took place which brings the case within those authorities. I am clearly of opinion, as clearly as I can be, knowing that I am counter in this respect, certainly, to an authority for which I feel very great deference, namely, the Master of the Rolls, probably to the Lords Justices, and I have some reason to suppose, also to some at least of your Lordships, that it does not. I am bound to state my view of the case; I think that that doctrine

does not apply to a case where the representation is not a
 * 215 representation of a fact, * but a statement of something
 which the party intends or does not intend to do. In the
 former case it is a contract, in the latter it is not; what is here
 contended for, is this, that Mrs. Jorden, then Miss Marnell, over
 and over again represented that she abandoned the debt. Clothe
 that in any words you please, it means no more than this, that she
 would never enforce the debt; she does not mean, in saying that
 she had abandoned it, to say that she had executed a release of the
 debt so as to preclude her legal right to sue. All that she could
 mean, was that she positively promised that she never would en-
 force it. My opinion is, that if all the evidence had come up to
 the mark, which, for reasons I shall presently state, I do not think
 it did, that if upon the very eve of the marriage she had said,
 "William Money, I never will enforce the bond against you," that
 would not bring it within these cases. It might be, if all statutable
 requisites, so far as there are statutable requisites, had been com-
 plied with, that it would have been a very good contract whereby
 she might have bound herself not to enforce the payment. That,
 however, is not the way in which it is put here; in short, it could
 not have been, because it must have been a contract reduced into
 writing and signed; but that is not the way in which this case is
 put; it is put entirely upon the ground of representation. Now,
 my Lords, I think that the not adhering to this statement, call it
 contract or call it representation, is no more a fraud than it would
 be not adhering to her engagement, if she had said, "Mr. William
 Money, you may marry; do not be in fear, you will not be in
 want; I promise to settle 10,000*l.* consols upon you." If she does
 not perform that promise, she is guilty of a breach of contract, in
 respect of which she may be sued, if it is put into a valid form, but
 not otherwise; so if she had said, as she did to William Money,
 "I mean to give you every thing I am worth in the world;
 * 216 * I promise to do so," her not doing so, is no fraud in the
 sense in which these cases speak of fraud; it is no misrep-
 resentation of a fact which the party is afterwards held bound to
 make good as true; it seems to me that the distinction is founded
 upon perfectly good sense, and that in truth in the case of what is
 something future, there is no reason for the application of the rule,
 because the parties have only to say, "Enter into a contract," and
 then all difficulty is removed. It appears to me, therefore, that

this which is the ground upon which the Master of the Rolls proceeded, and upon which he thought that the plaintiff Money had the right to restrain the Jordens from enforcing this bond, fails, for the reasons which I have stated.

There was another ground, however, upon which it was suggested by Mr. Money, and strongly argued, that he was entitled to relief, and upon which ground my then learned colleague Lord Justice Knight Bruce also decided in favour of the plaintiff. It was this: It was said that the Midnapore property, which was settled by Mr. Money, the father, upon Miss Marnell, then in India, was a mere gift, a mere voluntary settlement, a settlement, therefore, which it was competent to Mr. Money, the settlor, to defeat by parting with it for a valuable consideration to another: that Mr. Money, the father, when his son was about to marry, had an interview with Mrs. Jorden (this is the allegation); and that, as the result of that interview, he agreed with her that he would never exercise the power of revoking the Midnapore settlement, in consideration of her engaging never to enforce the bond; that that agreement having been entered into, upon the faith of it the parties married. Mr. Money has certainly, if such an agreement was entered into, performed his part of it, for he has since died without ever attempting to exercise that power of revoking the gift of the Midnapore property. * And I may say, in passing, that it appears to me that the allusion which was made in the course of the argument to the Statute of Frauds in such a case is wholly inapplicable; it would not apply at all. The contract sought to be enforced against Mrs. Jorden would be a contract not to sue upon a certain bond; that is, not within the Statute of Frauds: if there was a valid consideration for that contract, unquestionably she was bound to perform it. I advert to this only because certain expressions fell from me in the argument, in which I said that the Statute of Frauds could not be insisted upon for another reason. I only wish to say that I doubt the validity of that reason; but in truth it comes to the same result, because I think that the Statute of Frauds in no respect applies.

The question upon this part of the case is simply one of fact. Is it made out by such evidence as can justify a Court of justice in acting upon it, that such a contract as that which is alleged really was entered into? I thought when the case was before the Lords Justices below, and I am unable to alter that opinion, that

it was not so made out. As I stated before, it is spoken to by only one witness, and could only be spoken to by one witness, because it is a contract at which nobody was alleged to have been present except Mr. Money himself; and it is positively denied by the other party to that alleged contract, namely, Mrs. Jorden, who is the defendant. Now the rule of the Court of Equity in such a case is perfectly clear: the present law of evidence, which my noble and learned friend has introduced, which allows the parties to be examined, may create a little difficulty about that sometimes; but that difficulty cannot arise in this case, because that which is now the law of evidence for examining parties was not then in force.

The rule of equity is clear, and is one of good sense, that if
 * 218 a particular allegation is supported by * only one witness,

and is positively denied by the answer of the defendant, and there is nothing to show that the one is more to be credited than the other, you cannot enforce against the defendant that which rests upon the testimony of one witness contradicted by the answer of the defendant. The existence of such a rule is not denied; but then it was very ably argued by Mr. Roundell Palmer, that you must take that rule in its entirety; that though the rule is, that if a matter spoken to by one witness is contradicted by the answer, it cannot be enforced, if there is no reason to give more credit to the witness than to the answer; yet it certainly may be enforced if the answer is such that, looking at it altogether, it is an answer you cannot rely upon. I take it, that the real sense of that qualification is, that you must look at the answer with the concomitant circumstances, which may tend to depreciate that answer; and you must look at the testimony of the witness with all the circumstances which may tend to invalidate that testimony; and, doing so, I still come to the conclusion which I arrived at before, that there is not only nothing to satisfy me that this contract was entered into; but I must go further, and say I am quite convinced, as far as I can be convinced of a transaction to which I was not a party, which is one of many years' standing, and upon which we have very little testimony, that that contract never was entered into in the sense of Mrs. Jorden understanding that she was binding herself to do that which I suppose Mr. Money thought she was binding herself to do.

In order to show that Mrs. Jorden's statement is not to be relied upon, Mr. Roundell Palmer made a very able analysis of her evi-

dence, for the purpose of showing that she has, in a great variety of particulars, stated matters which are so entirely at variance with the testimony of a * host of other witnesses, that * 219 you cannot rely upon a word she says. I think that is a very legitimate mode of looking at the answer, to see whether it is an answer that can be put in competition with the testimony which goes against it. It may be that this is a matter as to which it is almost impossible to state exactly what it is that influences the mind ; but I cannot say that I arrive at the conclusion at which he does, that Mrs. Jordan is a person altogether so untrustworthy that you cannot believe what she says. I do believe she has stated in her answer many things which are entirely inaccurate. I believe that she very often said that she wholly abandoned the debt ; that she had the greatest affection for William, and wholly abandoned the debt. What did she mean by that ? Why, she meant to say (what was perfectly true at the time) that she had no intention of enforcing it. That that was her meaning, and her only meaning, is, I think, to be deduced from the evidence of a great number of witnesses, even of those who speak most strongly upon this subject. [His Lordship here went into a very minute examination of the evidence, in order to show that the expressions of Mrs. Jordan merely meant an intention never to enforce the bond, and that even the words " had abandoned " must be so construed ; it being especially to be remarked, that the evidence to establish the use of those particular words was, in every instance, evidence given according to the form of expression which the form of the interrogatory had itself suggested. He then examined the evidence as to the alleged contract arising out of the declaration by Mr. Money the elder, that he would not execute a deed to deprive her of that property if she would abandon the claim on the bond ; and he then proceeded thus :]

In the first place, what I think a Judge, in deciding upon this matter, has to satisfy himself upon, is this: Looking * to * 220 what is stated by the defendant upon the answer, and deducting from it all you please on account of the loose and incorrect way in which Mrs. Jordan has represented many of those transactions, which are rather questions of feelings than questions of fact, do you believe, can you believe, as a Judge, that this passed under such circumstances, that Mrs. Jordan understood herself to be entering into a positive contract, that on the one

side the Midnapore property should be hers irrevocably, and that on the other she should never enforce the bond? My Lords, I cannot believe that she so understood it; and not meaning to say any thing against Mr. Money, who I believe to be a gentleman of the highest respectability, who is now dead, and whose testimony would be entitled to all weight, I must say, that I think, if this be a correct account, that in a conversation which he had, it was agreed by and between Miss Marnell and himself, that in consideration of his permitting her to continue in the possession and enjoyment of that property, she should engage wholly to abandon the debt, it is the most unfortunate thing I ever knew in my life that Mr. Money, a barrister, a man advanced in life, whose son was about to marry, who, as the father knew, had this outstanding claim against him, if he thought that this was a positive contract, and that the lady so understood it, — I say it is the most unfortunate thing I ever knew in my life, that he did not reduce it into writing, because if the lady so understood it, she would have been perfectly willing to sign the writing. I cannot help thinking that some loose conversations took place then as before, but that was all. I will not say that Mr. Money knew that Mrs. Jorden did not understand it to be a contract binding on her, but there is her own positive denial that she did so know and understand it.

Then I think beyond that, the further evidence furnishes * 221 * strong ground for supposing that the parties themselves did not so understand it. Because, observe what passed. This marriage had been contemplated in the year 1844; it was not effected till the year 1845. In the year 1844, while the marriage was first in contemplation, the mother, Mrs. Money, who is a French lady, had a conversation with Miss Marnell, in which she strongly pressed Miss Marnell to give up this bond, and, what is partly relied upon is, that she did then agree not to enforce the bond. Now, my Lords, what I understand from that conversation is exactly the contrary, that she did not agree, that she would not agree, but made excuses for not agreeing to give up the bond. She made excuses for not giving up the bond. She said, "She wanted to keep it; that it would be necessary for her to have it, because another person, at that time a bankrupt, was liable." But she repeatedly, when asked to give it up, says, "No; I will never enforce it"; but being pressed to give up the bond, she

added, "No; I will be trusted. I will not give you up the bond." What is the meaning of that? It is this: "I will retain my legal right, and I will make you rely upon my honour." That is what she means. I must say, after this, to enforce it, is a breach of honour as strong as one can well imagine. About that I have no doubt. But the question is not whether Mrs. Jorden has forfeited her honour, but whether she is now enforcing something which she did not always assert she had a right, and would retain her right, to enforce; and when she said to Mrs. Money, "I will give you my word of honour I will never enforce it, but I will not give it up"; whether she did not mean by that, "I will keep the bond, because I will keep my legal right." That this was the understanding of the parties is perfectly manifest from subsequent negotiations with Mr. Money, to which he speaks, because if * the parties had understood this to be an engagement * 222 upon her part positively that she would not enforce it, what is the meaning of Mr. Money afterwards stipulating, that if she will then agree not to enforce it, he will agree never to disturb the Midnapore settlement? The conduct of the parties seems to me to show clearly that that was the understanding of all of them. I have no doubt she made them the promise in honour, but that she made this distinction: "It shall be in honour only, or binding in honour only, but that the bond, or that which constitutes the legal right, I will retain."

That is made, I think, still more manifest by what takes place after the marriage. Mr. Money says in his evidence, that he communicated this fact in express terms, that it was agreed by and between, and so on; that he communicated that to young Mr. Money, his son, previously to the marriage. Now let us see what happened. The marriage of Mr. Money took place in 1845. After that marriage, occurred the marriage between Miss Marnell and Mr. Jorden, and I cannot but think that in all probability this question never would have arisen if that lady had remained single. Let us see what Mr. Dalston, the solicitor, states. You must bear in mind, if Mr. Money is correct in his evidence, that it was a contract; it was one of the details and particulars of which young Mr. Money, the intended bridegroom, who afterwards married, was perfectly apprised, because he told him of it immediately afterwards. But what took place between him and Mr. Dalston? [His Lordship here went through Mr. Dalston's evidence as to an

interview between him and Mr. W. Money, at the chambers of the latter, and then said:] — It seems to me that what Mr. Money then stated is utterly irreconcilable with the notion that that gentleman knew that previously to the marriage, and in
 * 223 consideration of the marriage, a valid * contract had been made, whereby the Midnapore property had become irrevocably the property of Mrs. Jorden, and the bond, so to say, irrevocably his property. It appears to me that the statements are very difficult, if not impossible, to be reconciled the one with the other.

I may further remark (and this is rather reverting back to another part of the case, which I think it is necessary to allude to, but which I forgot to do before), that Mrs. Jorden did not understand that the bond had been given up, is, I think, perfectly plain from this: that after her brother's death, she complained that George Money had not renewed to her the offer he had made to her brother. Perhaps it is unnecessary to refer to that; it breaks the thread of what I am saying, and which are the concluding remarks I have to make upon this case.

It appears to me, upon the grounds I have stated, first, that there is nothing within the meaning of the authorities or of principles to make this a representation by which Mr. and Mrs. Jorden are to be bound. I think further, that the second ground, and that on which the Lords Justices wholly or mainly proceeded, namely, the existence of a valid contract as to the Midnapore property, has not been made out by evidence upon which your Lordships can safely act, and consequently, that there has been nothing established which impeaches the right of Mrs. Jorden, as the representative of Richard Marnell, to enforce this bond. I repeat that I do believe that she often and often told this young man that she would leave him all her property, and that she would never enforce this bond; that I believe she said this over and over again, knowing that it would come to his ears, but that that was all that was said either expressly or impliedly, and said with the qualification, "I will not give up my right to the bond; you
 * 224 must trust to my honour." That is the way in which * I interpret what she has said from time to time, and that being so, however discreditable or dishonourable it may be, having so spoken, to recede from it, it appears to me that that is a ground upon which your Lordships cannot safely act, and that consequent-

ly there was no valid foundation for this bill, which I think, therefore, ought to have been dismissed.

LORD BROUGHAM. — My Lords, this case has given me, as I believe it has the rest of your Lordships, no small anxiety in the course of the argument, and subsequently, in considering its details before coming to a decision, for there are a great many facts, and a very considerable number of matters not easily reconcilable one with the other, and no little obscurity hanging over parts of the case, even after all attempts shall be made to reconcile and to explain the darker passages. But there is also another circumstance which has given me very considerable anxiety, and that is the manner in which it was disposed of in the Court below. For, first, we have the judgment of a most learned and able Judge, the Master of the Rolls; then an appeal from that decree to the Court of Appeal in Chancery; and then the two learned Judges, the Lords Justices, differing upon the subject; so that, in reality, there cannot so much be said to have been a decision of the Court of Appeal, from which this case comes to your Lordships, as that in consequence of the difference of opinion between the learned Judges, before whom the decree of the Master of the Rolls was brought by appeal, there could be no decision, and that therefore, of necessity, the decree of the Master of the Rolls stood.

If I found, upon examining the reasons of that learned and most able Judge, for whom I entertain the greatest respect, that upon the question of fact that learned Judge * entertained * 225 one clear opinion, and that by the Lords Justices differing, it was sanctioned by the concurrence of one of those learned Judges, I should certainly feel slow to disturb that judgment when brought before your Lordships by appeal.

But upon examining the decree of the Master of the Rolls, and the reasons which he gave, I do not find that he proceeds upon the same ground as that upon which Lord Justice Knight Bruce proceeded, when he differed from my noble and learned friend; and I do not find that there was that difference of opinion upon the matters of fact in the case between the learned Master of the Rolls and my noble and learned friend, one of the Lords Justices, in the Court of Appeal below. The Master of the Rolls proceeded upon the ground of there having been such a misrepresentation by Louisa Marnell, afterwards Mrs. Jordan, as brought the case with-

in the authorities which have been referred to, beginning with *Gale v. Lindo*, and followed by *Neville v. Wilkinson*, and *Montefiori v. Montefiori*. I entirely agree with my noble and learned friend that this is not a case of that kind. For example, in *Gale v. Lindo*¹ the ground is stated to have been a misrepresentation of a material fact, giving rise to what had taken place. The Lord Chancellor (who must have been Lord Jeffreys at that time, October, 1687), said "That which was once a fraud will always be a fraud"; and so acted upon that principle on the ground of preventing or frustrating a fraud.

In like manner take the case of *Montefiori v. Montefiori*.² There a man had stated that he owed his brother a sum of money upon the balance of partnership accounts, and gave a note for that amount to be shown to the friends of the lady whom he was * 226 about to marry, upon which a * marriage took place shortly afterwards, and so forth. The rule for the attachment was discharged upon the ground of misrepresentation of a fact, and Lord Mansfield said: "The law is, that where, upon proposals of marriage, third persons represent any thing material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it."

So in *Neville v. Wilkinson*,³ the plaintiff had stated his apprehension that the disclosure of the whole truth as to his debts would prevent his marriage, and he induced the defendant, in making out a list of his debts, to omit from that list the amount which was due to himself. He was after the marriage, on a bill filed for the purpose, restrained by injunction from proceeding to recover the amount upon the ground of his own representation. And Lord Eldon, in speaking of that case, in the case of the *Vauxhall Bridge Company v. Earl of Spencer*,⁴ says he remembers arguing the case of *Neville v. Wilkinson* before Lord Thurlow; but Lord Thurlow thought that the defendant, "having made a representation, a Court of equity must hold him to it, and that although the plaintiff was *particeps criminis*."

In all those cases, therefore, there was a misrepresentation of the facts. And the learned Master of the Rolls appears to consider that in this case there was a similar misrepresentation. In my

¹ 1 Vern. 475.

² 1 Brown, C. C. 543.

³ 1 W. Bl. 363.

⁴ Jacob, 64, 2 Madd. 356.

opinion, there was a misrepresentation by Louisa Marnell of an intention as to her will, and a promise was made by her; but of misrepresentation of fact there was none. She simply stated what was her intention; she did not misrepresent her intention; and I have no manner of doubt that, at the time she made that statement, she had the intention which it is stated she * pro- * 227 fessed, of never putting William Bagley Money in trouble, by proceeding upon the bond.

Then, taking the evidence before us, and not merely relying upon the answer, but taking the evidence of the witnesses, particularly that of Mrs. Money, the mother, as to what took place between her and Mrs. Jorden, and coupling that even with what took place afterwards between Mrs. Jorden and Mr. Money himself, the father, I certainly have, after very considerable doubt upon some parts of the case, but after fully viewing the whole particulars, and examining those statements and those depositions, come to the conclusion by which my noble and learned friend abides, the conclusion to which he arrived in the Court below, that there was not an abandonment of the debt, by Mrs. Jorden; not only that there was not an abandonment of it, but that there was rather a refusal of abandonment, when you come to examine in what sense, and with what intent the word "abandonment" has been used. And here I will only step aside for one moment, to bear my testimony to the truth of what my noble and learned friend has represented with respect to himself. I have not known any Judge here less obstinately wedded to his own opinion, or more disposed to reconsider the grounds of his own opinion, when that opinion has been appealed from, than my noble and learned friend. I have known other Judges also show the same laudable candour, when sitting in a Court of appeal. I have known Lord Lyndhurst, on more than one occasion, when his judgment was brought here upon an appeal, at once admit that he had erred in the Court below, and join in reversing the judgment which he had there pronounced. Upon other occasions, especially on one very remarkable occasion, I mean the case of *Attwood v. Small*,¹ where he had given an elaborate judgment * in the Court * 228 below, when sitting as Lord Chief Baron in the Court of Exchequer, I have known him adhere (as my noble and learned friend has here to-day), upon a reconsideration and fuller argu-

¹ 6 Clark & F. 232.

ment at this bar of the whole case, to the opinion he had already given, and support that opinion by most able and elaborate reasons, to induce your Lordships to join him in affirming the decision of the Court below. In that case, I had the misfortune to differ from my noble and learned friend, and I stated to your Lordships the grounds of that difference, the result of which was certainly a reversal of that decree by your Lordships. I state that for the purpose of showing that it by no means follows, when there is an appeal from the Court below, and the same Judge sits here upon appeal from his own judgment, that there is very little doubt what will be the result, though at times such an opinion may have been entertained. Upon hearing a case more fully argued, as it generally is in a Court of appeal, a learned Judge may differ from the opinion he originally held, or he may abide by that opinion, and in either case he is bound conscientiously, in the discharge of his duty, to state his opinion as well when he adheres to and abides by his former opinion, as when he alters it and agrees with the reversal.

It is important to consider a very material part of this case, which consists of the depositions of Pulcherie Money, as to the conversation which she had with Miss Marnell upon the subject of the bond. — [His Lordship here read it.] Now I beg to say that I give entire credit to that very respectable lady's deposition, as I do indeed to almost all the depositions here. The question is rather one as to accuracy of recollection than any thing else. Mrs. Money, in effect, says, "Trust me with the bond, instead of keeping it yourself." But Miss Marnell answers, "No, I will be trusted"; and she refuses to give it up. Each says, "Trust * 229 * me"; and the question is which is to be trusted with the bond. That is to say, there is to be no abandonment of the claim at law; there is to be no giving up of the right to sue upon the bond, but Miss Marnell says: "Trust me; you may depend upon it I will not sue upon it, but give it up I will not; you shall not be trusted with it, but I will not enforce it." She would keep the bond in her own hands; she would retain the right; she would not abandon the right; she is asked to abandon the right, and she says she will not. Indeed, what happened afterwards shows that she still considered herself to possess the legal right. Mrs. Money herself, speaking of what occurred after the brother's death, says, "she complained to me that the said

George Money did not make the same offer to her ; and she added that it 'was ungenerous in him not to have done so, but that the reason for his abstaining must be that he well knew that she was incapable, out of love to William (meaning the plaintiff) and gratitude to himself (the said George Money) to enforce the bond.' "

I come now to the next transaction between Mr. Money and Mrs. Jorden respecting the Midnapore property. First, I must observe that there is some difficulty in understanding the whole account of the Midnapore property, from the way in which possession was kept. Mr. Money's account is, certainly, that he had made it over as a free gift to Mrs. Jorden, but if you look at the dates, this story is not very intelligible ; it appears that he cannot exactly tell the date of the conveyance giving it up, but it is clear it was early in January, 1832. And yet if you look at Mr. Money's depositions, as well as at that of Mr. Lowe, his agent, he appears to have kept possession of it till 1838. The main question, however, is with respect to what Mr. Money maintains took place between him and Mrs. Jorden, upon the abandonment, as he said, of the bond * and the right to sue upon * 230 the bond, in consideration of his giving up the Midnapore property, and the intention of settling it upon the marriage of his son. And upon that I must say that I agree with my noble and learned friend, that you have here the answer distinctly and clearly denying that transaction, and you have only the evidence of Mr. Money affirming it.

Now, before coming to say a word upon that, I wish again, upon the subject of the abandonment, in addition to what my noble and learned friend has said in respect of the use of the word "abandonment" by Mrs. Jorden, to remark that according to the evidence of Mrs. Money and her husband, I think it perfectly reasonable to conclude that she does not intend then to say, that the debt was gone and abandoned. Other witnesses carry the matter no further ; they only show the declaration of an intention not to enforce the bond, an intention, no doubt, at that time sincerely entertained. [His Lordship here referred to the evidence of several of the witnesses.] All the evidence shows that when asked to make a complete abandonment by giving up the bond, she said, "No, she would do no such thing ; her honour was enough, but she would retain her power over it."

With respect to what took place between her and Mr. Money, in the first place, I must observe that that must have taken place probably a year after the conversation between Mrs. Money and Mrs. Jorden. Now if there had been a complete abandonment, and if Mr. Money and his family considered it in that light, and considered that she had given it up, and that there was an end of it, I think it is not very consistent with that view of it that that should have taken place respecting the Midnapore property to which he deposes, and which forms the most important part * 231 of the case; for it is quite clear that he * could not have considered that the debt was abandoned at that time, nearly a year after the conversation with Mrs. Money, which was in July and August, 1844; the marriage taking place in August or September, 1845, and the conversation respecting the Midnapore property with Mr. Money occurring immediately preceding that marriage.

My noble and learned friend has justly observed that the rule is, that if a distinct denial is given in the answer, that denial shall not be countervailed by the testimony of a single witness; and Lord Eldon, in a case which has been referred to, of *Evans v. Bicknell*,¹ lays that down; adding, "Unless a circumstance attaching credit to the assertion counterbalances the credit of the denial"; that is to say, that there must be some circumstance clear and undenied, some fact in the cause, if I may so say, which casts the balance against the denial, and therefore defeats the effects of the answer.

I do not think that a reference to the analogy of a prosecution for perjury can be said to be quite wide of the mark here, although I must admit that that would be sufficient to support an allegation against a denial in an answer which might not be sufficient to support an indictment in a criminal proceeding against a party alleged to have committed perjury. Nevertheless we shall derive some advantage, I think, in the consideration of this question, from observing, what is the rule, and what is the course of proceeding upon the subject of perjury. Where there is perjury assigned, it is not sufficient, in support of that assignment, to produce the evidence of one witness, because there it is said you have only oath against oath;² and some Judges have gone so far (the late

¹ 6 Ves. 174.

² Per Parker, C. J., *Reg. v. Muscot*, 10 Mod. 192, 194.

Lord Tenterden, almost to the end of his judicial life) as to hold not only that * there must be enough to cast the * 232 balance, but that there must be a second witness to support the testimony of the first against the oath of the defendant.¹ That has been relaxed, undoubtedly, and is no longer the course of criminal law procedure in this country. It does not require a second witness in order to support an assignment of perjury; but it has been held, that the testimony of a single witness, however clear and however much entitled to credit, was not sufficient to countervail the oath of the defendant, and to support the assignment of perjury against him, unless that testimony could be "supported by circumstantial evidence of the strongest kind."² These are the words of the learned Judge in the case, and I quite agree with him.

One circumstance in the case of the respondent has been relied upon in the very able argument of Mr. Roundell Palmer, which I take it to be quite clear would not apply in the case I have put, namely, that in some other matters there is discredit thrown upon the statements in the answer. I do not exactly agree with those who hold that those circumstances do throw discredit upon the swearing in an answer such as this. It is said, that Mrs. Jordan denies in the answer having stated that she had very great affection for William Money, "having the deepest affection for him," and having treated him as a mother would treat her child. When we look at the answer, it really does not appear that she denies having had great affection for him; she only denies it *in quantum*, in degree. [His Lordship * examined the evi- * 233 dence on this point.] All that seems to be only a kind of saving, perhaps, of her own pride, and sometimes possibly a want of due reserve and due caution in stating an expression, I will not say of her opinion, but of her sentiments. But all this does not go, in my apprehension, either to discredit her in point of veracity, or even to discredit her in point of accurate recollection of those

¹ 3 Stark. Ev., tit. Perjury, 859, n. (q): "It has been so held, *ut audiui*, by Lord Tenterden."

² Champney's Case, 2 Lewin, C. C. 258, by Mr. Justice Coleridge. "One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind. Indeed, Lord Tenterden, C. J., was of opinion that two witnesses were necessary to a conviction." See *Rex v. Mayhew*, 6 Car. & P. 315, and the note there; and see *Reg. v. Wheatland*, 8 Car. & P. 238, and *Reg. v. Hughes*, 1 Car. & K. 519.

matters of fact, which, like the alleged transaction between her and Mr. Money respecting the Midnapore conveyance, are transactions and matters of fact upon which it is perfectly clear she had a most distinct recollection.

I think that the conclusion at which I have arrived is supported by those circumstances to which my noble and learned friend adverted at the close of his address to your Lordships. I do not think that it is possible to read the evidence of Mr. Dalston, and to examine what took place with respect to his dealings with his clients, without coming to the conclusion that there had been no abandonment upon her part, and that he did not at that time act as if there ever had been such. I consider that it is inconsistent with the case made for the plaintiff below (the respondent here), and that it goes but to support the allegations made upon the part of the appellant, and the allegations, or rather the denials, contained in the answer.

Upon the whole, therefore, I am of opinion, after very great consideration of the facts, that the decree of the Master of the Rolls cannot be sustained.

LORD ST. LEONARDS. — My Lords, it is my misfortune on this occasion to differ from both my noble and learned friends. I differ from them upon the facts, as well as upon the law applicable to those facts ; but I think my noble and learned friend on the Woolsack stands in need of no apology for maintaining
 * 234 * the opinion which he gave in the Court below. I quite agree in what has fallen from my noble and learned friend opposite, that nobody can be more open than my noble and learned friend on the Woolsack is, upon points which come for consideration before this House, upon which he has already given an opinion in the Court below, to reconsider his decision.

I shall be under the necessity of troubling your Lordships in rather minute detail with the facts of this case, in order to justify the view which I take of them, before I state what I consider to be the law as applicable to the case. Whilst in India, George Money conveyed the Midnapore property to Louisa Marnell, for, as stated in the deed, 10,000 rupees, the price which he had previously paid for it ; a receipt for the consideration was indorsed on the deed and signed by George Money, but not a shilling was paid. Money, therefore, had a lien on the estate for about 7000

rupees, allowing for the 1200 rupees and interest; or if the conveyance was really voluntary, he might have defeated it by a sale or settlement for valuable consideration. Let us now inquire what, in point of law, was the operation of that, in order that we may know how Miss Marnell and Mr. Money stood towards each other in relation to the property at that period. That conveyance was either partly for a valuable consideration, or it was simply voluntary. If it was simply voluntary, then though Mr. Money could not directly have put an end to it for his own benefit, yet he could (because the Statute of Elizabeth enables him to do so) have put an end to it indirectly. For example, he might have settled it for a valuable consideration on his son's marriage, or he might have sold it to a third person, and put the money into his pocket; and in either of these ways he would have defeated the title of Miss Marnell. But supposing that is not the true view of the case, then * there is another, which is clearly * 235 the only other view that can be taken of it, namely, that it is to be treated according to the view which Miss Marnell herself never could be heard by any statement of hers to deny, as a positive conveyance for 10,000 rupees, and that the sum of 1200 rupees, with interest upon that sum, was actually paid or allowed in consideration of the 10,000, leaving the difference as the balance. Then the law is perfectly clear that Mr. Money had a lien upon that estate as against Miss Marnell for the sum of 7000 or 8000 rupees, and that was a debt which he might at any time have enforced against the estate, whenever he thought proper to do so.

Under those circumstances, there is abundant proof of kindness, which I dare say was very well returned by very substantial friendship and very kind acts, on the part of Mr. Money towards Miss Marnell and her brother, during their residence in India. The brother, Richard Marnell, dies, and the parties come back at different periods to this country. The friendship appears to have been renewed after their return to this country; and Charles Marnell having money, the transaction giving rise to this bond takes place.

The transaction in which William Money became involved whilst his father was in Spain was a highly improper one on the part of Charles Marnell, who took a bond payable in two months from this youth, a lieutenant in a marching regiment, without a shilling beyond his pay, and also a warrant of attorney, upon which judgment was entered up. George Money was desirous to

compromise the claim, and offered to pay 400*l.*, and was pressed to do so by his son, but this offer was rejected. During Charles Marnell's life, Louisa expressed herself in strong terms against the transaction, and she said to George Money, at Charles Marnell's bedside, just before his death, that if * Charles had left her his property, William should never pay one farthing of that bond; it was a most unjust transaction on the part of Charles. The next day, 29th January, 1843, Charles Marnell died, and Louisa was his legatee; and on the night of his death, after referring to the above conversation at his death-bed, she went with her servant to the room where the body was lying to search for the bond. She wrote a letter to William, desiring his presence at the funeral, and told her servant that she had set Willy's heart at rest about the bond; and when he arrived, she told him that she had found the bond (she had a copy of it), and he was safe, and he kissed and thanked her. About this time she declared to those about her that she had abandoned the debt, and that William should never pay a farthing. A few days after Charles Marnell's death she applied to Manning, her attorney, to give her up the bond, as she wished to give it up to the "dear boy," as she had abandoned the debt. Manning evaded the request by saying that something might be got from Hooper, the co-obligor. Six months afterwards she renewed her application on the same grounds, but was again put off by Manning. She still declared that she had abandoned the debt. A few days after her first interview she proved her brother's will, but wholly omitted the bond from her account of assets, and when, as late as August, 1845, she made an affidavit on payment of increased duty, she did not supply the omission. Her acts and declarations were consistent up to this period.

On the 9th March, 1843, Manning and Dalston wrote to George Money that the terms proposed in Charles Marnell's lifetime would be accepted by Miss Marnell, and claiming the 400*l.* from him. George Money, on the next day, wrote an answer that his offer had been rejected, and he declined to renew it. This has been * 237 much relied * upon as evidence that the debt was not abandoned; but the application was to the father, who was not bound, and not to the son, who was. There is a letter of the son to Miss Marnell, on the 11th of March, in which he tells her what had passed between him and his father about the attorney's

letter, as a matter in which he had no concern, and in which he thanks her for a post-office order (so that she was sending him some pocket money), and he signs himself, "Your loving boy, Willy." She had repeatedly declared that she had adopted him. It is distinctly proved that the application by the attorney was made without her knowledge, and that she disapproved of it, although upon one occasion she said it was ungenerous in George Money not to renew his offer, but that he well knew that the bond would never be enforced against his son. Upon two occasions she burned some papers, and said that it was the bond; no doubt upon one occasion she burned the copy in her possession. She told Dalston, in reply to a question, what she intended to do about the bond, that the debt was abandoned altogether. All this time William intended, when of ability, to pay Miss Marnell 300*l.*, which he considered his full share of the original liability, but which she said she never would receive.

At length in 1844, William entered into an engagement to marry, which he communicated to her by a letter, signed, as usual, "Your loving boy, Willy." She stated to her maid, to whom she had often spoken on the subject, as she constantly did to her other servants, that she had forgiven William his debt, and that he was about to be married to a rich lady. She had, previously to the marriage, conversations with George Money and with his wife, and also with G. Henry Money, a brother of the plaintiff, and all prove her declarations of abandonment of the debt. Some of the expressions have been much commented upon, but they
 * are consistent with her previous declarations, and no step * 238
 had been taken to follow up the demand by the attorneys, on George Money, in 1843. These declarations were communicated to Lady Poore, and she swears that William did marry on the faith of the abandonment of the debt, and that it was upon the faith of that abandonment she consented to the first life interest in the property of her daughter being settled upon William; and she would not have permitted such settlement to be executed if she had not confided in such abandonment. It appears that Lady Poore released her own life interest in part of the settled funds. After the marriage, Louisa Marnell lived near to the young people, and continued to state to several witnesses that she had abandoned the debt.

We shall presently see what the legal effect is; but, as a matter

of fact, I state to your Lordships, without the possibility of any man disputing it, that the marriage took place, and that the young lady's property was settled upon this gentleman for his life upon the faith of the representations which were made by Louisa Marnell, that she never would call for that bond. What was the consequence, if she, Miss Marnell, reserved the right to exercise the power to call for the money, and did exercise it? Why, that Miss Marnell would find the property of this young lady ready to be taken in execution, as well as the person of this young man, which was taken in execution (after all her pretended affection, throwing him into jail); she would find this young lady's property ready at her hands to pay her the debt which she had so often declared she had abandoned; which property, if she had not so declared, would never have been subject to be taken in execution for that debt. For of course Lady Poore would have taken care

not to give the young man a life interest in it, and the property would have been secured without the power of *239 anticipation for the separate use of the young lady herself, which would not have left Miss Marnell the opportunity of destroying the settlement, and depriving these young people of the only fund they had to subsist upon, namely, the property of the wife. After all her representations, declarations, and protestations over the death-bed of her brother, to those who came in contact with her, that she had abandoned the bond, she suddenly, upon the fact of herself having married, called upon the plaintiff to pay it. Your Lordships see she does marry at rather an advanced period of life, and then she carries this bond as a marriage portion to her husband, and her husband prosecutes the claim upon this bond, which was a debt relinquished, and gone, and abandoned, and, in fact, in the view of a Court of equity, as I apprehend, beyond all power of dispute, given up.

If these facts are established, I consider that they raise an equity which is not to be resisted, according to the rules of equity, as I understand them.

Let us now see what took place with regard to the Midnapore property. [His Lordship went fully through the evidence.] It is perfectly clear as any thing ever was, that if he had settled that property on his son, one of two results would have followed, that is, that he either would have been able to set aside the conveyance of the Midnapore property, or he would have been entitled to come

against that estate for the 7000 or 8000 rupees, the remainder of the debt, with interest ; so that there was a real tangible interest in the father which remained in him, and which he could deal with, had she not relinquished the bond, and said : “ Do not let there be any trouble of this sort ; I do not mean to enforce it.” He says, that they came to an agreement upon the matter. It is now argued that that, if any thing, was a contract ; but I will not so treat it, and I am not arguing that your Lordships are * driven to treat it as a contract in the proper sense of the * 240 word. It is, however, a representation by one party of an intention to do an act which he refrains from doing in consideration of another party giving up a right to something else, and refraining from doing another act ; and I will show your Lordships that that is perfectly good in law, and can be enforced without any legal contract at all.

Observe, that I use that only as a part of the *res gestæ*. I have shown to your Lordships, that the father had the actual power in his hands over Midnapore, either to the whole extent of the estate, or unquestionably to the extent of the lien upon it, for the 7000 or 8000 rupees, and the interest ; so that he had something to give up, independent of affection and kindness, in consideration for the something which she had to give up. He says : “ I will not enforce the right against you, which I know I have, if you will not enforce your right against my son.” That is a representation which your Lordships will presently see the effect of in point of law ; but it is a representation that does not depend upon contract ; it is not buying and selling, but dealing in representation between parties, a part of the *res gestæ* of the case up to the time of the marriage. I need not say that if you believe that fact, if you believe that there was such a representation, and that the father said, “ If you will not come against my son for this debt, I will not impugn your title to the Midnapore property,” no lawyer would deny that it would clearly be a perfectly valid transaction binding in a Court of equity, and which might be enforced in a Court of equity, if not of law.

But then it is said that this is not legally proved, because we have only one witness asserting it, and it is denied in the answer. Upon that, I beg leave to say, that I come to a different conclusion. The rule is, no doubt, perfectly clear, that you cannot receive the evidence of a single * witness against the answer * 241

of the defendant ; and here, no doubt, we have the very clear and distinct evidence of Mr. George Money met by the solemn denial of Mrs. Jorden on her oath in the answer. So far the case seems to fall within the rule. But then the rule holds good only where there are no circumstances which go to corroborate the witness as against the answer ; if there are any, the evidence of the witness does bear a weight which the answer does not, and you are entitled to use the evidence against the answer.

Are there any such circumstances here ? In the first place, was or was not the father in a situation in which he could validly convey, if he had pleased, a portion, if not the whole, of the Midnapore property to his son ? Is that the fact or not ? Is it the law or not ? I have already told your Lordships that I believe it is, and I believe that my noble and learned friends do not dispute that he had the right either to the whole extent of the 10,000 rupees, or a very large portion of that sum. Supposing, therefore, that he had that right, and that he never exercised it, and that he was most anxious to have the marriage of his son effected, and that it was necessary to the perfection of the marriage settlement that he should be discharged from the debt under the bond ; and that this lady, to whom he had shown so much kindness, had always declared that she had abandoned the debt ; I ask your Lordships, whether those are not circumstances in the evidence to which you are bound to look, which do weigh (they weigh in my mind with the strongest possible force) against the answer of this lady, and which, therefore, give to the evidence of the single witness, corroborated as it is by all these circumstances, a strength that does enable you, and ought to enable you, to come to a decision, that this fact is proved as against the answer ?

But, independently of that, there is a very great difficulty
 * 242 * connected with the answer in other respects. I should be exceedingly sorry to say a word which could reflect upon this lady, who may have been very much misled in what she did. She is an excitable person ; all affection at one time, and all desire to have the money at another time ; but I desire not to reflect upon her testimony. Her answer has been drawn up by the attorney from instructions, but no one can read this evidence and this answer, as I have done, or take the same pains with it that I have taken, without arriving at the conviction, that the answer is not an answer to the facts, according to those facts as they existed.

My noble and learned friend has relied upon her answer as to Midnapore as a test of her veracity, but the truth is, that with respect to Midnapore, there was no dispute about it; but I do not consider it at all a just test of her accuracy to take her answer as to Midnapore, for this reason: I do not find it anywhere stated in the answer, that she had paid any portion of the purchase money of 10,000 rupees. She evades making such a statement in every sentence. She says it is expressed to be paid, but she takes care never to pledge her oath to the question, whether it was paid or not. We know it was not paid. Why did not she say what the real fact was? She knew that she had never paid a shilling, and yet in page after page, just as you come to the point where you expect her to tell you whether it was paid or not, she takes care to evade it. Then, my Lords, if her evidence is to go upon her answer, I contrast it, as Mr. Roundell Palmer did with great force, with the evidence of the other witnesses upon the different facts; and I am compelled to say that a state of circumstances is proved by a crowd of witnesses, being witnesses of truth, which, beyond all doubt, is utterly inconsistent with the answer. But then, if the answer is to stand as against a particular witness, or a particular fact, which is * one out of twenty, what is to pre-

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vent me from trying the worth of the answer as regards nineteen other questions? I have a right to apply that test. Suppose that this question was now being tried at law; suppose that under the new Law of Evidence, framed with great care by my noble and learned friend, the parties themselves were examined, if in nineteen out of twenty questions she had denied a number of facts, every one of which had been proved by witnesses to your satisfaction, what credit would you give to her answer to the twentieth question, when a disinterested witness came forward and swore like the rest to something contrary to what she had said? I place, therefore, great reliance in this case on this circumstance, that her general testimony in her answer is directly at variance, as I can show it to be, with the facts, as clearly proved in the case. Indeed, this has already been done, and it would be wasting your Lordships' time to go through it again. I could show again, if it were necessary, that her testimony is not a true and correct statement of the facts, but that it is contradicted by a great many witnesses in this case. Therefore without any contest as to the evidence, we may assume that there was an undertaking by the

one party not to pursue the right as against Midnapore, which was met by an undertaking by the other not to pursue the right upon the bond. That is a very important circumstance, but it is not a necessary circumstance, for the marriage of William was itself a sufficient consideration. If, without having a shilling of interest in Midnapore, if Midnapore had never existed, she had said, previous to the marriage, intending the parties to believe her, and to act upon that belief, "I will never enforce this bond," I apprehend the law to be that she never could enforce it afterwards.

As soon as her own marriage had taken place, she and
 * 244 * her husband set about endeavouring to enforce the bond.

Now there is some evidence to which I must call your Lordships' attention, as very great stress is laid upon it, a stress I cannot persuade myself it is entitled to. It is the evidence of Mr. Dalston, the attorney, which has been already referred to. It arose in this way, that they (Mr. Dalston and Mrs. Jorden), meaning, as I understand, to revive the judgment, they were anxious to see whether William Money would allow it to be revived, and he proposed to have a meeting, and Mr. Dalston met William Money at his chambers, where a statement was made to him. Mr. Dalston tells you that he knew nothing of the facts stated by Mr. Money. He knew nothing of the facts! Why, he had travelled through the case from the beginning to the end. He was the attorney who witnessed the bond; he was the attorney who was to manage the delicate transaction, or rather the indelicate transaction, with regard to Mr. Hooper; he was so according to the paper. I should be very sorry to misrepresent him. The words of the paper are, "If Hooper refuses to give a new security, Marnell will follow Dalston's judgment as to whether it will be more advisable at that time to destroy Hooper's certificate, by the documents proving his gambling, or to wait till the death of his father before pressing him." I do not say at all that that fixes Mr. Dalston; I am only saying that the parties were looking to him throughout, and it shows that they considered that he would give them advice whether they were to take the course so improperly suggested in that paper; but what I do say is this, that Mr. Dalston, from the beginning to the end of this transaction, was the attorney; that he cannot separate himself from Mr. Manning; that the application on the former occasion when George Money refused to pay, and stated the reason

why he refused to pay, was signed "Manning & Dalston," * and therefore, if there could be any ground for the one * 245 separating himself from the other, they did not separate themselves, for those letters were written in the name of the firm. And I say that when it is proved by all, beyond the power of dispute, that Louisa Marnell went to Manning & Dalston, and saw Manning on two different occasions, separated from each other by the distance of six months' time, and demanded from him, as far as she could, the bond which he ought to have delivered up to her, and which, if he had delivered up as he ought to have done, and was bound to do, it would have been destroyed, and there would have been no litigation in this case; and when he advised her to put it off, saying, "We may yet recover something from Hooper"; and when, by and by, he writes the letter to which I have referred, which was written without her concurrence, which is not attempted to be proved to have been by her direction, and which she disclaimed to the witnesses (although at one time she said it was a shabby thing of George Money, the father, not to pay her the 400*l.*), I say that the whole of this proves that Mr. Dalston, in point of law, must be considered as knowing every thing which had taken place in regard to this bond, from the time that he signed it as a witness, down to the moment when the conversation took place at the chambers with William Money, as soon as this lady was married, two or three years afterwards.

Not meaning to make any imputation at all upon Mr. Dalston, his evidence is open to this very just observation, that when an attorney goes to an adverse party with a view to a compromise, or to an action, you must always look with very great care at his evidence of what then occurred. There must be such a disposition in an attorney who has brought an action, to maintain it, that it is always very desirable that the attorney should abstain as much as possible from talking to a person when he means afterwards * to swear to the conversation, and upon that * 246 conversation to found a right which otherwise might not be found to exist.

With these observations as to the weight of the evidence, I will state what he says. [His Lordship stated the evidence.]

I confess that this evidence certainly very much astonishes me; it only shows how frail the memory of man is. Mr. Dalston says that is the first time that he ever heard of these circumstances.

Why, of course he knew all about the partnership transaction, as it was called. I say that he knew it, for this reason, that in point of fact he was a witness to that bond; he prepared it, and the bond was in lieu of the money which had been embarked in that speculation. And it is too much to ask your Lordships to believe that he could have prepared that bond for the young man, describing himself, too, as the attesting party, the young man being a lieutenant in a marching regiment, and having not a farthing, except his pay, without inquiring why the money was demanded, why a bond was obtained from him and this Mr. Hooper, and a judgment from him alone; so young a man as this, just then about to embark in the Indian service. The solicitor must have asked, What are the circumstances? What money has been passing? All must have been told to the solicitor; he was the person who prepared the bond, the partner of Manning, and consulted him on several occasions. When Mr. Manning refused to deliver the bond to this lady in order that she might give it up to this young man, refused twice and evaded it afterwards, and then wrote a letter without her concurrence and direction in order to obtain the 400*l.* from the father, — an attempt which did not succeed, — can you believe that that must not have been communicated to Mr. Dalston? And even if it had not been communicated to Mr. Dalston, the letters coming from “Manning and Dalston”

were in law binding on them as a partnership firm, and
 * 247 neither of them can withdraw from * being fixed with the knowledge of that which was known either to the one or to the other. Well, then, I say I do not mean to press upon this gentleman the imputation that his veracity is to be impeached. I have no doubt that he meant to speak the truth, but he has forgotten all about it. But if his partner, Mr. Manning, had been examined, or if he had gone to the meeting, he would have been perfectly acquainted with the matter, and therefore if Dalston had inquired of his partner before he went to this meeting, he himself would have known all that he was bound to know.

But that conversation, which appears to me to be perfectly consistent with the case of the plaintiff, is thought to bear against him. It is said, that if it had been supposed that there had been an agreement with Mr. George Money, the answer of the young man would have been, “Why, you have already given it up.” I think his answer was a true one; but I think it shows to your

Lordships that Midnapore was only one of the circumstances to occasion the abandonment of the bond ; that she gave it up independently of Midnapore ; but she did more than that ; she gave it up for the consideration of Midnapore, though she had given it up before Midnapore was mentioned. The whole result of this evidence is not to be arrived at simply by weighing syllable by syllable and looking at sentences ; but let anybody, after looking at all the evidence to which I have called your attention, just say, as a jury, aye or no, was there a clear explicit abandonment by this lady of this bond of 1200*l*. ? If that question was submitted to a jury, I am myself confident that the result would be, that any jury to whom this question was put would deliver a verdict in favour of the plaintiff.

Having so far drawn your Lordships' attention to the * facts of the case, I ask what is the effect of all this ? I * 248 think I have shown your Lordships, from the evidence and from the facts, that the debt was abandoned, as far as it could be abandoned, both from affection and from the circumstances connected with the two families, for a valid consideration, namely, the intended marriage ; and for a further valuable consideration (if that were necessary), namely, the abandonment of, or the non-execution of, the right to defeat the gift of the Midnapore property. Then, what is the effect of that in point of law ? As I understand the way in which it is put by my noble and learned friend on the Woolsack, it is this, and I am trying to see whether my view of it can be considered as in any way an answer to it. My noble and learned friend has made use of a form of expression that the whole question here turns on this, that in point of law, in order to avail yourself of any statement in a case like the present, it must be a misrepresentation of the facts, and not a declaration of what you intend to do or intend to omit to do. It is my misfortune not to agree in that view of the matter. I do not consider that that can be the case. I think it is utterly immaterial whether it is a misrepresentation of fact, as it actually existed, or a misrepresentation of an intention to do, or to abstain from doing, an act which would lead to the damage of the party whom you thereby induce to deal in marriage or in purchase, or in any thing of that sort, upon the faith of that representation. It is admitted that if she had said, " I have cancelled the bond, or have destroyed it, or burnt it," and she had not done so, then the plaintiff must

necessarily have succeeded in a Court of equity ; but it is said that if she states, " I have got the bond, but you may safely rely upon it that I never intend to use it," that is not a misrepresentation of a fact, but only the declaration of an intention.

* 249 * What is the principle upon which the cases have proceeded ? The principle is simply this, that you shall not be allowed, either in a Court of equity or in a Court of law, to misrepresent the state of circumstances in which property exists, so as to deceive parties and induce them to rely upon your statement, and to deal with matters of the utmost importance ; for example, as in this case, with a marriage settlement, or in the purchase of property, which is a very common case. If, therefore, I either say that I have abandoned a security, or that I never will enforce that security, and a third party is induced to enter into marriage upon the faith of that statement, although it may have been unwise (as in this case it was) that the party did not insist upon a release in order to make the thing quite regular and right, yet surely it is not meant to be argued, — it is not, I think, arguable, — that that man can afterwards enforce that right after an act has been done upon the faith of that declaration ; an act which cannot be undone as to the party whom he has induced so to act. The whole current of authorities is the other way.

Take it even on the Midnapore property, and let us see how it stands. George Money says : " You have got a bond against my son ; it may at this moment not be binding, but he is about to be married ; now therefore come to a determination, for the settlement will depend upon your determination. I have a right to affect your title, or to load your title to Midnapore with a heavy liability, and I can do that in favour of my son. I will not enforce my right if you choose not to enforce yours ; that is agreed to, and that is a mutual promise." Can either party retire from that promise ?

Now, take the case which was decided a century and a half ago, and has been several times decided since, and is not
 * 250 disputed in law, namely, where a man makes his * will and gives to a devisee all his property ; he then tells the devisee that he is about to alter his will because he wants to give legacies to other persons, and the devisee says to him (there being nothing in writing), " If you will abstain from revoking your

will, I promise you that the legacies shall be paid"; and the man abstains from revoking his will. It is perfectly settled law, that in such a case the devisee having made the promise is bound by it. Yet that is not a misrepresentation of a fact; it is a declaration of an intention and a promise to do a thing in consequence of which a threat is not acted on, and a Court of equity has over and over again enforced the right thereby created, and nobody disputes the authority to enforce it. Now, how is that distinguishable from this case? Mr. Money says, "If you will not enforce that bond, I will not enforce my right; I will not, if you will not; if you will, I will." In the other case, the testator says, "If you will pay the legacies which I wish to give, there is no need of a codicil." In either case it rests on a mere promise. The Statute of Frauds, about which something has been said, does not operate as any bar to the enforcement of the right by those who would have been legatees of a testator against the man who became devisee under the circumstances I have stated; and as a lawyer I am at a loss to distinguish that case from this in point of principle.

As regards the authorities upon this subject, the question is, whether I can find a case with the facts just the same as those of this case? My noble and learned friend said, that the cases which he referred to were cases where there was a misrepresentation of a fact, and that therefore they do not form a precedent for this case. But the question is, what is the principle involved in these cases? Certainly I should recommend your Lordships to consider that principle as extending to this case. Let us hear how the principle * is put in the case of *Montefiori* * 251 v. *Montefiori*; ¹ Lord Mansfield there lays down the principle thus: "The law is, that where upon proposals of marriage third persons represent any thing material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be." And the other Judges concurred. Now it may be said, again, that that is representing something in a light different from the truth. Is it not different from the truth to represent that you have abandoned a thing; that you never will attempt to enforce it; and then subsequently to come forward and say you have not aban-

¹ 1 W. BL 363.

doned it, and never did ; and that you are going to enforce the right, even to the extreme of throwing into jail the man who is so much the object of your affection ? I can no doubt distinguish, in point of fact, the one case from the other, but not in point of principle. The principle is the same in both. She is asked, “ Have you abandoned it ? ” (an abandonment is perfectly good as a consideration for marriage.) She now says that she had not abandoned it, and never did. Then she formerly stated that as a fact which was a misrepresentation, for that she said she had abandoned it, is a fact which is proved beyond all doubt. Therefore if a misrepresentation of fact were necessary, she has misrepresented a fact, for she stated over and over again, not only that she intended to abandon it, but that she had abandoned it ; and now she says that she had not abandoned, and never said she had abandoned it.

Independently of that, your Lordships are asked to consider that a representation of an intention is not a binding act, and that you cannot misrepresent what you intend to do. But if * 252 you declare your intention with reference, for * example, to a marriage, not to enforce a given right, and the marriage takes place on that declaration, I submit that, in point of law, that is a binding undertaking.

In the case of *Neville v. Wilkinson*,¹ Lord Thurlow refers to the language, and adopts, after some hesitation, the very rule of Lord Mansfield, which goes to the real principle of the case.

There is a case in *Viner*² of this nature. “ The bill here was to have a lease according to the defendant’s promise, plaintiff having laid out money in the premises ; and the defendant insists on the statute, there being no agreement in writing, nor any certain terms agreed upon, and says what plaintiff laid out was not on lasting improvements, but admits plaintiff built a stable, which cost him about 10*l*. It was proved that defendant told the plaintiff his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord Chancellor said that the defendant is guilty of a fraud, and ought to be punished for it, and so decreed a lease to the plaintiff ; though the terms were uncertain, it is in the plaintiff’s election for what time he will hold it, and he doth elect to hold during the de-

¹ 1 Brown, C. C. 543.

² Vin. Ab. Tit. Contract and Agreement, 523, pl. 40.

fendant's term, at the old rent, and plaintiff to pay costs." Now, to be sure no case was ever carried further than that. The equity was of a trifling nature, and the terms not clear, and a Court of equity never undertakes to perform, or to decree, that which cannot be ascertained; but the defendant had promised and agreed to put the plaintiff in possession of a lease, and declared that "his word was as good as his bond," and the Lord Chancellor held that he was bound by this agreement, in connection with the act done (and here the act is much stronger than that which took place * there), and that the Statute of Frauds, though * 253 pleaded, could not operate in bar.

There is a case before Lord Thurlow, of *Tawney v. Crowther*,¹ in which there was an agreement drawn up and not signed, and one party who refused to execute the agreement swore that he refused to sign it because they could not come ultimately to terms; the father of the other party swore that they had come to terms, and there were two writings produced of the man promising, and the phrase was, that "his word was as good as his bond," just the same as the words in the last case. The Lord Chancellor Thurlow there ultimately held that the man was bound, although he had not signed the agreement, and there were these circumstances: there was oath against oath, and the answer; but the Lord Chancellor makes this observation: he says, "It has been argued that he declined to sign it. If he had said he would never sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it; if he said he never would sign it, because he would not hamper himself by an agreement, it would be too perverse to be admitted; but here I am of opinion that the agreement must be performed."

There is another case of *Cookes v. Mascall*;² in that case it was an oath against the answer, which it was not in the former case. There was an agreement for marriage, or proposals, and it appeared that the proposals seemed to be approved, because the father of the intended husband went with an attorney to the father of the intended wife, and the attorney drew an agreement to be mutually signed, but before it was ready for execution, as Mascall, who was the father of the lady, swore positively, they disagreed, and that he refused to proceed and never signed it. The son's

¹ 3 Brown, C. C. 318.² 2 Vern. 200.

* 254 * father swore that the articles were read over and agreed to, and that it was arranged that they should meet another time to execute them ; so that there was an oath against the answer. The son was permitted to go to Mascall's house, and in December the daughter was married, with her father's approbation. In that case the agreement was enforced against her father. Here was an agreement therefore. The parties differed about whether the agreement was ever actually concluded, and there was no witness ; but as the father afterwards received the intended son-in-law, and witnessed the marriage, he was held bound by these terms which he had never signed, amounting to a promise to make a settlement, and he was compelled to perform it. That proves, therefore, that the Statute of Frauds in such a case will have no operation,¹ but that the promise to do an act, followed by marriage, which cannot be undone, is equivalent to a binding agreement to do that act.

There are other cases to the same effect, but I will just refer you to the case of *Pickard v. Sears*,² where Lord Denman says : " But the rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a
* 255 certain state of things, and * induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time ; and the plaintiff in this case might have parted with his interest in the property by verbal gift or sale, without any of those formalities that throw technical obstacles in the way of legal evidence." Now, that is exactly this case ; for this lady having represented that she had abandoned the bond and would never enforce it against this gentleman, who

¹ In a report of the same case in a previous page (p. 34), it is said, that the Court gave the plaintiff a twelvemonth's time to try it at law, whether there was an agreement so fixed, as they could maintain an action at law upon it, and that afterwards either side might resort back to this Court. This was in Hilary term, 1688, and the hearing and decision referred to in the text, and reported at p. 200, did not take place till Hilary term, 1690, so that there was ample time to try the action at law ; but the second report does not say whether any trial had taken place, nor does either report refer to the other ; but the second report says that the Court decreed performance " according to the writing drawn by the attorney," though that was not signed by the defendant, as it was intended it should have been, nor any other agreement reduced into writing.

² 6 A. & E. 469, 474.

thereupon enters into a marriage treaty, a settlement following upon that, it would be impossible for her, consistently with the principle of that case, afterwards to say that she had not abandoned the bond, but that she would enforce it against him.

That is followed by the case of *Gregg v. Wells*.¹ The Chief Justice there says, referring to *Pickard v. Sears*, that "The principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." So that, if this lady had stood by, had made no declaration, but knowing that they believed from the former declaration that that bond never would be enforced, and that, acting upon it, they had made a settlement upon that young man for life, and she had afterwards attempted to enforce the payment of her bond as against that property, that declaration would be entirely good and perfect as an answer to such claim. That was followed by a similar case in the Exchequer, *Freeman v. Cooke*.²

I submit, therefore, to your Lordships, that in point of law this case clearly comes within the scope of those authorities ;
 * and with great submission to my noble and learned * 256
 friends, with whom it is my misfortune to differ, my apprehension is, that the rule of law clearly extends to this case, where the facts are made out that she did abandon the bond ; that she abandoned it for a pecuniary consideration ; that the marriage followed upon her declaration, that the settlement was made and the property vested in this gentleman in consequence of it ; and that he never would have become possessed of the property which was settled upon him so as to make it available for paying the debt, if they had not trusted to that declaration of hers, that the bond was abandoned. Having promised that she would not enforce it, she is, in my opinion, bound by that promise. The Statute of Frauds does not extend to this case.

My Lords, looking at the whole of the circumstances, from the beginning of the transaction down to the time of her own marriage, I should, but for the opinions expressed by my noble and learned friends, have thought it a clear case, both in point of law and in point of evidence. I regret that my noble and learned

¹ 10 A. & E. 90, 97.

² 2 Exch. 654.

friends, who I believe have never doubted that the claim is inconsistent with the justice of the case, should differ with me upon the evidence and on the law.

Having, for the reasons I have stated, come to the conclusion that this appeal ought to be dismissed with costs, I should, were it not for the different opinion of my noble and learned friends, have advised your Lordships, upon the weight of evidence as to the facts and upon the rule of law, as I understand it, to adopt the same view. As it is, the decision will be the other way.

THE LORD CHANCELLOR. — The case will go back to the Court of Chancery, with a declaration that the bill ought to have been dismissed without costs.

Mr. Rolt prayed for repayment of the costs already paid.

* 257 * THE LORD CHANCELLOR. — We refer it back to the Court to do what is right, and to take into consideration the fact that the bill ought to have been dismissed without costs.

Lords' Journals, 7 July, 1854.

STANTON v. PERCIVAL.

1854. February 22, 23, 26, 27. 1855. April 26.

STEPHEN J. B. STANTON and others, *Appellants*.

SUSANNAH PERCIVAL, *Respondent*.

Investment of Money on Trust. Lunatic. Committee. Evidence. Pleading. Taking Statements in Answer as true.

Where one person intrusted with sums of money to invest for the benefit of another has signed an agreement admitting an amount due on investments made, equity will compel their transfer.

A., B., and C. were committees of a lunatic. To a bill filed against the lunatic and themselves, as committees, they put in an answer stating certain facts. That cause went to issue, and witnesses were examined. The lunatic died; A. and the wives of B. & C., who were relatives, obtained letters of administration to her estate as her next of kin. The plaintiff in the original suit then filed a bill of revivor against A., the two wives, and their husbands, merely praying for a revival of the suit. The ordinary order was made. The defendants to the bill of revivor put in an answer, in which they craved to have the full benefit of the answer to the original bill; there was no replication to this

answer. The original answer contained statements which at the hearing were admitted to be read against the defendants :—

Held, that under the circumstances of this case these statements were properly admitted in evidence.

Where there is no replication to the answer to a bill of revivor, is a plaintiff bound, if he relies on the original answer, to take it as absolutely true in all particulars ?

Is an answer by committees binding upon the estate of the lunatic ?

It is binding on them in any other character.

Is a replication necessary to an answer to a mere bill of revivor ?

* THIS was an appeal against a decree of the Master of the Rolls which had been affirmed by Lord Chancellor Truro. * 258

Mrs. Percival had, in October, 1847, filed a bill against Sarah Caney (then a lunatic), and against the appellants, S. J. B. Stanton, George Verrall, and Robert Page, committees of her estate, charging that certain stock, to the amount of 4000*l.* and upwards, was then standing in the name of Sarah Caney, which said stock was purchased with the money of the plaintiff. The allegations of the bill were, that in the year 1805, Sarah Caney came to reside with the plaintiff, then the widow of Richard Withers, and living at Wentworth Place, Mile End ; that they became very intimate, and the plaintiff put great confidence in her, and took her advice in pecuniary affairs, and from time to time intrusted her to invest money for the plaintiff ; that in the year 1816 the monies so invested by Caney for the plaintiff amounted to 1500*l.* ; that in that year the plaintiff was about to marry one James Percival, and Caney advised the plaintiff that as she would bring to her intended husband about 300*l.* a year in house property, she ought not to let him have possession of her invested monies, but to allow Caney to hold the same in trust for the plaintiff ; that the plaintiff agreed to this, and did so allow Caney to hold the stocks and monies on her behalf, and to receive the dividends, and Caney accordingly received and reinvested the dividends. In 1837 the plaintiff separated from her husband, James Percival, and so remained separated from him till his death. At the time of the separation, the monies of the plaintiff held in trust for her by Caney, amounted to more than 4000*l.*, and the bill alleged that the plaintiff then requested Caney to pay her the dividends on the said sum ; that Caney (who was in the habit of going to receive the dividends, accompanied by a Mrs. Mary * Dryden) did so, pay- * 259

ing to plaintiff what she required, and retaining the rest for reinvestment. The bill then alleged that statements had been made by Mrs. Dryden to Stanton (who was her son) as to the fact that Caney held large sums of money belonging to the plaintiff, and that such statements were made in the presence of Job Hammond and of Elizabeth, his wife ; that Mrs. Dryden died in October, 1838, and after that, Stanton always accompanied his aunt, Caney, to receive the dividends, and paid over to the plaintiff the whole or part thereof as she required, and particularly in September, 1843, he so paid over to the plaintiff " the sum of 60*l.* as part of the amount of the dividends " then due. The bill went on to allege, that in July, 1845, in consequence of conversations as to the amount of the monies due from Caney to the plaintiff, a memorandum was prepared by Stanton, by which it was acknowledged that the debt amounted to above 4000*l.*, and that the memorandum remained in the possession of Stanton ; that Caney was a woman of very penurious habits, which, for the purpose of accumulating money, she carried to such excess, that, in the latter part of 1845, Stanton, her nephew, procured a commission of lunacy to be issued, under which, in November of that year, she was found and declared a lunatic, unable to manage herself and her affairs, and to have been so lunatic from the 1st day of October, 1842. The bill went on to allege other circumstances to prove the possession of this money by Caney on the plaintiff's account, and prayed that an account might be taken for principal and interest ; that Caney might be declared a trustee for the plaintiff for the amount ; and that the same might be ordered to be paid to the plaintiff out of her estate, and for general relief.

The defendants in their answer denied in general terms the allegations of the bill, and set forth, that in December, * 260 * 1845, the plaintiff made a statement to them to the effect that about twenty-two years before, she being about to be married to James Percival, transferred 2000*l.* or more in consols to Mrs. Caney, who afterwards received for her the dividends on the same ; that search had since been made in the books of the Bank of England, and that no trace of any such transfer could be found. They admitted that Mrs. Dryden (who died in October, 1838) had about four or five years before her death spoken about the money due from Caney to the plaintiff, and had said " she believed it to be a large sum " ; but could not tell the amount, and had never

talked of it after that time. And as to the giving of the memorandum, the answer proceeded to state the matter thus: "That in or about 1839, Stanton met the complainant at the house of Caney, when much altercation took place between the complainant and Caney, with reference to money matters; and the complainant insisted that Caney owed her money, but was unable to state the amount; that Caney at first denied that she owed any thing, but afterwards named a sum, and the complainant at length stated that the amount she claimed to be due was 4800*l.* consols; that Stanton was surprised at the amount so claimed, and being much alarmed, and seeing nothing to prevent the complainant from naming what amount she pleased, and putting forward a claim equal to the whole amount of the property of Caney, he thought it best, on the spur of the moment, to sketch out a memorandum, with a view of limiting the complainant's claim to the sum then stated; and this he accordingly did, and the same was then signed by the complainant and Caney, and witnessed by Elizabeth Hammond, then an attendant on Caney; which memorandum was in the words and figures following: 'It is mutually agreed that there is now standing in the name of Sarah Caney the sum of *four thousand three hundred pounds Consolidated *261 Bank Annuities, belonging to Mrs. Percival. S. S. Percival. S. Caney. Witness, E. Hammond''"; but that at that time he knew nothing whatever of the said debt, except what he had heard from his mother, Mrs. Dryden, though he supposed there was something due; that Caney was not, at the time of signing the memorandum, capable of understanding what she was about, but he thought no harm could be done in getting something signed on the plaintiff's behalf by S. Caney, more particularly as in the then state of mind of Caney he considered that the same could not be binding upon her; and, at the same time, he being alarmed at the amount of the complainant's claim, was desirous of fixing a limit thereto; and with such views and feelings he prepared the memorandum, and permitted it to be signed: he further admitted that he afterwards paid the plaintiff dividends, calculated on a stock of 4800*l.*, but said he did so on his own responsibility.

In January, 1848, the plaintiff filed an amended bill, more fully setting forth the matters previously alleged in the original bill, and adding some other facts. The amended bill, among other things,

alleged a specific transfer of a sum of 850*l.* consols on the 16th of February, 1816, by the plaintiff, to Sarah Caney, to be held by her in trust for the plaintiff; it then corrected the date of the memorandum (changing it from July, 1845, to February, 1839), which it set forth in the same terms as in the defendant's answer, and then averred that, at the time of signing the said memorandum, Sarah Caney was quite calm and rational, and appeared to understand its purport, and to know well what she was doing. The amended bill then set forth a demand, in January, 1846, of a copy of the memorandum, and a refusal of Stanton's solicitors to furnish one. The bill then prayed that the defendant

* 262 * Caney might be declared to be a trustee for the plaintiff of the sum of 4800*l.* three per cent. consols, and of the dividends in respect thereof, and might be ordered to account; and that the stock might be ordered to be transferred or sold, and, together with the dividends, paid to the plaintiff, and for further relief.

The answer to this amended bill, filed in June, 1848, admitted that the defendants now knew that there had been a transfer of the 850*l.* stock, but denied any other; it alleged that previous and subsequent to the signing of the memorandum, Caney was of unsound mind, repeated the statements as to the giving of the memorandum, and stated that Stanton had burnt it, "thinking it to be of no further use, as the Master acting in the said lunacy, on being satisfied (as then appeared to be the fact) that no sum of stock was ever transferred by the said complainant to the defendant, Sarah Caney, considered that it was unnecessary to pursue any further the inquiry into the claim of the said complainant"; but Stanton "denied that he burnt the same in order to conceal the contents thereof, or to prevent the complainant from enforcing her claim against the estate of Caney"; or from recovering the monies alleged to have been intrusted, or the stock represented to have been so acknowledged by Caney to belong to the complainant.

This answer was replied to, and the cause went to issue, and witnesses were examined on both sides.

A bill of discovery was, in January, 1849, filed by Caney, through her committees, Stanton, Verrall, and Page, and by them, in their own names as such, against Mrs. Percival, and was answered by her in the following month. Mrs. Caney died in

June, 1849, and the original suit abated. A bill of revivor was filed by Mrs. Percival against Stanton, Mrs. Verrall, and Mrs. Page, to whom letters of administration * had been * 263 granted, and likewise against Verrall and Page, who were joined for conformity. These defendants, in their answer to the bill of revivor, submitted that for the reasons stated by them in their answer to the original bill the plaintiff was not entitled to any relief; and "these defendants, further answering, say they believe that the said bill did pray, as in the complainant's bill of revivor, in that behalf mentioned, but they, these defendants, for their greater certainty, crave leave to refer to the said original bill, and these defendants' said former answer"; "and these defendants crave the same benefits as are craved in and by these defendants' said former answer to the said complainant's said original and amended bills, and the same benefits as if these defendants had pleaded the said several matters in the said former answers herein in bar to the said complainant's said bill." No replication was put in to this bill of revivor. The ordinary order to revive was made in December, 1849. In December, 1848, and March, 1849, witnesses were examined on both sides with respect to the transactions between the plaintiff and Caney, and with respect to the state of Caney's mind. The cause came on for hearing before Vice-Chancellor Knight Bruce, who, on the 4th of June, 1850, made a decree granting the prayer of the bill. This decree was taken by appeal before the Lord Chancellor Truro. On the 21st of July, 1852, Lord Truro made an order dismissing the appeal with costs. The present appeal was then brought. A motion was on the 7th of August, 1852, made before Lord Chancellor St. Leonards, that the execution of the order for the transfer of the stock might be stayed until after the hearing of the appeal in this House; and an order to that effect was made, directions being therein given for the payment of certain sums for the maintenance, in the mean while, of the plaintiff.

* *The Solicitor-General (Sir R. Bethell) and Mr. Steere* * 264 for the appellants.—The money here alleged to have been intrusted by the respondent to Mrs. Caney was put into her hands for the purpose of being fraudulently concealed from Mr. Percival, whom the respondent was then about to marry. A party who has so acted can have no equity to maintain a demand like the present.

Brackenbury v. Brackenbury,¹ *Cecil v. Butcher*,² where grants of landed estate collusively made to give a qualification to kill game were not allowed to be afterwards recalled. So that even if the evidence here proved that money to the amount claimed had been deposited with the lunatic, that money could not be recovered in this suit. But the evidence by no means sustains the claim. On the contrary, it shows that the respondent never could have possessed the money which she here claims. No decree for a transfer of stock ought to have been made in this case; an order for inquiry is the utmost that ought to have been granted.

The answer to the original bill was improperly treated as containing statements by which the defendants in the present suit were bound. That was the answer of a committee, which cannot be read against a lunatic, nor against the personal representative of a lunatic. *Leving v. Caverly*³ seems to be opposed to this argument, but the reasons there given for the decision render it a case of no authority. The case is this: "It was agreed *per cur.* that the answer of a superannuated defendant put in by guardian, is to be read against him, as an answer of one of full age put in in person; and a difference was taken between such an answer and that of an infant put in by guardian; because an infant * 265 improves and mends, and * therefore is to have a day, to show cause after he comes of age; but the other grows worse, and is to have no day." This is absurd. It is possible that an answer of a committee may be read for the purpose of discovery, but not for that of founding a decree. Here it was read for the latter purpose. There is no case nor any principle warranting a decree made on the admission of a committee or guardian *ad litem*. In *Freeman v. Grady*,⁴ a decree on such admission was expressly refused.

[LORD ST. LEONARDS. — Here the defendants in the bill of revivor are the personal representatives of the lunatic; they are also the persons who, as committee of the lunatic, made the admissions in the answer to the original bill. Can they, after the death of their principal, set aside their own admission?]

The question, what is the character, and what are the rights and duties of a committee? has been fully discussed in *Carew v. Johnston*.⁵ The idiot or the lunatic is like an infant. The answer

¹ 2 Jac. & W. 391.

² Prec. in Ch. 229.

³ 2 Sch. & L. 280, 292.

⁴ 2 Jac. & W. 565.

⁵ 8 Irish Eq. 137.

of the guardian *ad litem* does not bind him. By the established Chancery practice, where no commission has issued, a plaintiff cannot except to the answer of a defendant, of unsound mind, put in by guardian. The same rule applies in lunacy, *Shelford on Lunacy*.¹ No information as to the accuracy of the statement in the memorandum can be obtained from the lunatic, and it is now insisted for the appellants that the stock there spoken of, except as to the sum of 850*l.*, does not exist. The answer to the original bill was here, on a strained presumption, supposed to be incorporated into the answer to the bill of revivor. The words of the answer to the bill of revivor do not justify such a presumption. The * appellants merely claim the benefit of the * 266 former answer, but that does not bind them by all the statements made in it, and made by persons who did not represent the estate of the lunatic.

If, however, the appellants are to be bound by the statements made in that answer, which are against themselves, they are entitled to have the advantage of all that is there stated in their favour, and which must consequently be treated as true. The answer must be wholly accepted or wholly rejected. If taken altogether, then the answer utterly disproves the claim. It ought to have been treated in that manner, *Rowley v. Adams*.² It has been held in *Kershaw v. Matthews*,³ that the answer of a defendant, if a material co-defendant has not also answered, must be regarded merely as an affidavit, and the plaintiff may read affidavits against it. It was before thought that if a plaintiff read passages out of an answer, he made that answer part of his own case, and could not contradict it. Here, however, evidence was admitted to contradict parts of the answer. That was an erroneous proceeding, for the plaintiff had not put in a replication to the answer to the bill of revivor, and therefore had not put the matter there contained in issue, and so not one of these depositions, taken in the original suit, ought to have been read. Suppose a bill filed against an infant, an answer put in by guardian *ad litem* making a variety of statements; thereon the plaintiff and the guardian enter into evidence for and against; then the infant attains his majority, and applies to put in a new answer, and to make a new defence; and he does put in one, to which the plaintiff does not reply. If the

¹ Page 562, 2d ed. citing *Micklethwaite v. Atkinson*, 1 Coll. Ch. 173.

² 7 Beav. 395, 2 H. L. Cas. 725.

³ 1 Russ. 361.

suit should in that state be brought to a hearing, the matter might appear (on the bill and original answer) to be in favour of the plaintiff, * but on the bill and new answer in favour of the defendant; and if the Judge at such hearing permitted the original evidence to be read, he would be in error, for in order to receive evidence in a cause there must be a complete issue, *Powys v. Mansfield*.¹ Even at law the answer would not have been admissible against the defendants now on the record, *Fox v. Waters*.² Yet it has been received here, although it is admitted that but for words of reference, wrongly treated as words of incorporation, the former answer is not to be looked at, for that the answer of the administrators is the only one properly before the Court; and to that answer the plaintiff has not put in any replication. The statements of Stanton could not be used in the first suit as testimony against Mrs. Caney, for she had not the opportunity to cross-examine him; and his admissions as committee cannot be read against these appellants, for, as committee, he is not a party to this record, and the limited nature of the committee's power as to binding the estate of the lunatic prevents them having effect here. *Micklethwaite v. Atkinson* ³ shows that for any such purpose he is to be treated as a stranger.⁴

The proper remedy here was at law, and no bill, except for discovery, ought to have been allowed. This was a mere banking account, and when the respondent asked for her money and did not get it, she ought to have proceeded by action. A bill will not lie for transferring stock. *Cud v. Rutter*.⁵

[LORD ST. LEONARDS. — This is not like a banking account, for that is a general deposit of money to be repaid on demand. * 268 This was a deposit for a particular purpose, * namely, investment, and the interest on the money invested was paid. The fund was impressed with a trust for Mrs. Percival. The case, therefore, does not resemble *Cud v. Rutter*.] *Jones v. Brinley* ⁶ shows that the receipt of interest on stock does not give stock the character of money.

It is not admitted by the appellants that any trust existed here.

¹ 6 Sim. 565.

² 1 Coll. Ch. 173.

³ 12 A. & E. 48.

⁴ As to the power which the committee now possesses to deal with the lunatic's estate, see 16 & 17 Vict. c. 70, § 108 et seq.

⁵ 1 P. Wms. 570.

⁶ 1 East, 1.

In *Navulshaw v. Brownrigg*¹ the Court acted on the rule, that there could not be a transfer of jurisdiction effected by the mere addition of an item, namely, stock, to an account of money deposited, and that rule applies here. The claim is properly the subject of an action.

Mr. Roundell Palmer and *Mr. Wellington Cooper* for the respondent. — The allegation of a fraudulent purpose in investing these funds without the knowledge of the intended husband, is no answer to this claim against the estate of Mrs. Caney, and the appellants themselves avow that they only seek not to get the bill dismissed, but to have an inquiry. It is admitted, therefore, that the respondent is entitled to a decree for something. The respondent submits that the decree now made is correct. The cases as to the grants of property to give collusive game qualifications have no resemblance to the present.

[It was intimated that the learned counsel need not trouble themselves with this point.]

There is no valid objection to receiving in this suit against the personal representatives of the lunatic the answer of her committees, the defendants in the original suit. They are the same persons, and this is a mere bill of revivor. If that cannot be done, the appointment of a committee, and calling on him to give an answer, is an absurd formality. A committee has substantial *dominion over the estate for the purposes of the trust, * 269 so as to make him properly a defendant in a suit against the lunatic, which he conducts under the orders, and subject to the sanction of the Court of Chancery. In *Owen v. Davies*,² a decree for specific performance of an agreement was made against a defendant who had become lunatic since he entered into the agreement. That decree could only have been made on the answer of his committee. The form of the grant to the committee nearly tallies with the form of letters of administration. Williams on Executors.³ The answer of a minor may, after he comes of age, be read against him. And in the case of a corporation, a plaintiff may have the sanction on oath of the persons administering its affairs, in addition to the answer under the seal of the corporation; and he may so because the corporation has no conscience on which

¹ 1 Sim. N. S. 573.

² Vol. I. pp. 345, 346.

³ 1 Ves. Sen. 82.

a Court of equity can act, in which respect the case of a corporation and that of a lunatic resemble each other. The answer of the committee is therefore admissible as against the estate of the lunatic. It is not denied by the other side, that if the lunatic recovered her mind, she would be bound by the answer of her committee; and if so, surely the same answer may be read against her personal representatives after her death.

An infant may in some cases be bound by the answer put in by his guardian *ad litem*, *Guernsey v. Rodbridges*,¹ especially if, after opportunity given on his coming of age, he does not proceed to set it right, *Cecil v. Salisbury*;² but the present is stronger than those cases, for here is a distinct adoption of the former answer, not as now amended, but as previously pleaded. If the lunatic had recovered, and had done what these appellants have * 270 done, she could * not afterwards have objected to the answer. *Fox v. Waters*,³ is an authority for the respondent; for there, though the admission of one executor was not allowed to be evidence against his co-executor, it was treated as evidence against himself. Starkie on Evidence⁴ states the principle. *Beasley v. Magrath*⁵ is exactly in point with the present case. There a mother put in an answer in a suit against her son. In another suit against herself, that answer was received as evidence against her. The principle is, that it is an admission which is receivable against the person who makes it.

The answer must not be taken as true, although it is admitted to be read in evidence. It may be contradicted as to part, and its probability and accuracy may be considered, *Bermon v. Woodbridge*.⁶ The appellant Stanton, after having drawn up and attested the memorandum, now seeks to discredit it. In that respect he resembles those persons who having been attesting witnesses to wills, afterwards try to impeach their own act. Such witnesses have always been considered as liable to great suspicion, although their evidence has not been absolutely excluded from consideration, *Howard v. Braithwaite*;⁷ *Bootle v. Blundell*.⁸ There is no objection to the mode of proceeding in this case. *Pruen v. Lunn*⁹

¹ Gilbert, 4.

² 2 Vern. 224.

³ 12 A. & E. 43.

⁴ I. p. 332, n. (h), 3d edit.

⁵ 2 Sch. & L. 33.

⁶ Per Lord Mansfield, 2 Dougl. 788.

⁷ 1 Ves. & B. 207.

⁸ 19 Ves. 506, 507.

⁹ 5 Russ. 3.

shows that it is not necessary to bring a suit of revivor, instituted by the personal representatives of a defendant, to a hearing, for the purpose of making the order effectual against both the plaintiffs and the co-defendants. This was a mere suit of revivor, in which the plaintiff asked that the cause might be put in the same state as before the * death of Caney. The defendants * 271 did not object, but were content that should be done, and in their answer to the bill of revivor they craved the benefit of their answer to the original suit. No replication was necessary to such an answer, Mitford on Pleading.¹ But if it was absolutely necessary to have a replication, the practice of the Court is to allow a replication to be filed *nunc pro tunc* after the examination of witnesses has taken place, *Rodney v. Hare*.² Besides, the defendants here, after putting in their answer, obtained an order to renew publication, and then applied for leave to file a supplemental answer to the bill of revivor, so as to enable them to plead the Statute of Limitations; but that leave was refused, so that they treated the case as at issue, and cannot now be heard to set up the want of a replication as an objection to the proceedings that have taken place.

The Solicitor-General, in reply. — The answer of the committee cannot be taken to bind the estate of the lunatic, for he is nothing but the bailiff of the Court, exercising a kind of superintendence over the person, but not having any right to bind the estate of the lunatic. It is not admitted that the lunatic would have been bound by the answer of her committee had she recovered her senses. Before the late statute admitting the evidence of parties, he might have been examined as a witness, which shows that he was not considered a party to the suit. In truth, he is nothing more than an officer of the Court. The guardian of an infant is in a more important position than the committee of a lunatic; yet he cannot, by his statements, bind the estate of the infant.

Wrottesley v. Bendish,³ and the note to that case,⁴ * which * 272 show that for want of replication to an answer, it must be taken to be true, as the defendant is thereby precluded from proving it by calling witnesses. If a plaintiff, who is of full age, does not reply, it is an admission of the facts in the answer, *Legard v.*

¹ 3d edit. 141, 259.

² 3 P. Wms. 236.

³ Mosely, 296.

⁴ 3 P. Wms. 237, n. (E).

Sheffield.¹ If the answer was admitted, it ought therefore to have been taken as true.

1855. April 26.

THE LORD CHANCELLOR. — If the validity of this decree had turned upon the point argued at the bar, whether the answer of the committee can be read against the lunatic, so as thereby to bind her interests, I should have felt some difficulty in upholding it. The committee is but as a bailiff. It is so stated by Lord Coke in *Beverley's Case*.² He derives all his authority from the grant of the Crown, whose duty it is to protect the rights and interests of the lunatic. The grant of the Crown confers no estate on the committee, but merely the power of protecting the interests of the lunatic, and doing acts necessary for that purpose. The extent of the powers so conferred must be limited by their object, — that is, the protection of the interest of the lunatic; and it is impossible to say that a power to bind him by admissions can be considered essential for his protection. In truth, such a power would be a power against him, not in his favour. If he had continued *compos mentis*, third persons might have compelled him to make admissions for their benefit. The supervening lunacy, which is the act of God, prevents him from making admissions, and the effect of it is to oblige third persons, who seek to establish claims against him, to prove their rights by evidence, independently of admissions. This is certainly so in the case of an infant * 273 answering by his guardian. It is not necessary * to cite authorities to prove that, but there is the old case of *Eggleston v. Speke*,³ which establishes the point. It is not disputed that the same doctrine applies to the case of a person of weak mind, not so found by inquisition, answering by a guardian specially appointed for the purpose. How does the case of a committee differ from that of a guardian specially appointed? In the former case there is a grant from the Crown authorising the committee, and making it his duty, to protect the interests of the lunatic generally and on all occasions, subject only to the control of the Lord Chancellor or other persons intrusted by the sign manual. In the latter case, where there is no one clothed like a committee with such a general authority, the Court appoints a person to act as guardian on that particular occasion. It is not contended that the

¹ 2 Atk. 377.

² 3 Mod. 258.

³ 4 Rep. 127 b.

admission of a guardian so appointed would bind the lunatic, and I can discover no principle distinguishing the two cases.

As a general proposition, it is clear that no one can bind another by an admission unless he has an express or an implied authority for the purpose. Certainly, no such authority is or can be given by the lunatic to the committee; and how can such an authority be conferred by the grant from the Crown?

The committee sometimes has interests adverse to those of a lunatic, and then a guardian is appointed specially to conduct the defence. In such a case it is clear that neither the committee nor the special guardian can make admissions binding on the lunatic. All principle seems to me to be against the power contended for, and I have discovered no authority in favour of it, except the case of *Leving v. Caverly*,¹ the reasoning in which is so unsatisfactory, not to say absurd, that I think it would be impossible to * follow it. If, therefore, there had been no * 274 abatement of the suit, and revival, but the cause had been heard in Mrs. Caney's lifetime, I should have felt great difficulty in holding that she could have been affected by any statement made against her interest by the committee.

This, however, was not the case. After the cause was at issue and witnesses had been examined, Mrs. Caney, the lunatic defendant, died, and the suit was then revived against her personal representatives. It was against them that the decree was made which has been brought under review, and the question is, whether against them the admissions in the answer could be read.

The personal representatives of the lunatic are, her nephew, the defendant Stanton, and her two nieces, the defendants Sarah Verrall and Mary Ann Page, the wives of the two other defendants, George Verrall and Robert Page; the defendants, Stanton, and the two others, George Verrall and Robert Page, having, before the lunatic's death, been the committees of her estate.

The admissions or statements relied on by the plaintiff as establishing, together with the evidence in the cause, her title against the lunatic's estate, to the sum of 4300*l.* 3*l.* per cents., are admissions made by these defendants, Stanton, Verrall, and Page, as committees of the lunatic before the suit had abated by her death. The bill of revivor was a mere bill of revivor against Stanton,

¹ Prec. in Ch. 229.

George Verrall and Sarah his wife, and Robert Page and Mary his wife, introducing no supplemental matter, and seeking nothing but to have the suit put in the same state against the new defendants as it was in when the lunatic died, and that the defendants, the administrators and administratrixes, might admit assets, or that the usual accounts might be taken. The defendants, by

their answer, admit the several proceedings in the cause to * 275 have been had as * stated in the bill of revivor, and so that the plaintiff was entitled to revive. And further, they all admit assets coming to their hands sufficient to answer the plaintiff's demand. The answer to the bill of revivor further states, that for the reasons alleged in the original answer put in by the committees, the defendants to the bill of revivor submit that the plaintiff is not entitled to the relief she is seeking. The Vice-Chancellor, in his judgment, without deciding whether the answer of the committees could or could not be read against a lunatic, was of opinion that here that answer was thus adopted by the defendants in their answer to the bill of revivor, and therefore might be read against them. I should have great difficulty in coming to such a conclusion on the ground of any adoption in the answer to the bill of revivor of the statements in the original answer, even if, according to the fair construction of the answer to the bill of revivor, it did contain any such adoption ; for, in the first place, I think there was great weight in what was urged at the bar, that as the answer to the bill of revivor was not replied to, the plaintiff, if she relies on it, must take it as absolutely and completely true in all particulars. It would be manifestly unjust to permit a plaintiff to act on the ground that any part of an answer is untrue, which answer, by the course of his pleading, he has prevented the defendant from establishing by evidence to be true. But, secondly, the matters of defence raised by the original answer were in no respect in issue under the bill of revivor ; the only questions there were, first, the title to revive, and next, the question of assets ; and therefore the assertion in the answer to the bill of revivor of the former matters of defence was an assertion of matter irrelevant to the question then alone in issue.

This view of the case may be made more clear by considering how it would have been if the personal representatives * 276 * had been completely strangers, and if, instead of merely

adopting the former answer by reference, they had actually repeated it word for word, in their answer to their bill of revivor. In such a case, it would be clear, first, that the answer to the bill of revivor, if unreplied to, must be taken as true for the purpose of that bill; and, secondly, that even if taken for that purpose as true, it would not prejudice the right of the plaintiff to have the usual order to revive, the matter alleged by the defendants affording no answer to the only claim then put forward by the plaintiff, namely, to be placed in the same position against the new defendants as that in which she had stood in regard to the original defendants before the abatement. Assuming, therefore, that even the answer to the bill of revivor is constructively a reassertion of the facts stated in the original answer, I cannot satisfy myself that this removes the difficulty arising from the circumstance that the original answer could not be read (if my doubts on that subject are well founded) against the defendant Caney.

My Lords, I have thought it right to state what has thus occurred to me, though, in the result, I entirely agree in the propriety of the decree which is under appeal, for reasons which I will now shortly state.

In this case, one of the personal representatives of the lunatic, and the husbands of the other two, were themselves the committees whose answers are in question. Assuming that these answers could not be read against the lunatic, yet when the committees have themselves become defendants in her place, I can discover no reason whatever for doubting that, as against them, the answer may be read. It must be presumed that they would not have untruly stated any thing adverse to the lunatic, whose interests they are bound to protect; and by what they * have * 277 themselves stated, it is most reasonable that they should be bound. After the order to revive, the cause might properly be dealt with just as if the committees had been defendants from the beginning, not as committees, but in the right in which they were made defendants to the bill of revivor; and the question then is, whether the plaintiff would have been entitled to the decree now appealed from if the lunatic had been dead before the filing of the original bill, and if that bill had been filed against the defendants to the bill of revivor, and the proceedings which actually took place had been taken in a suit so constituted.

Now, it is to be observed that the defendants, that is, all the defendants, admit that assets came to their hands sufficient to satisfy the plaintiff's demand. This admission of the plaintiff's claim, if established, against the lunatic's estate, will entitle the plaintiff to a personal decree against all those by whom such an admission is validly made; that is, against the defendants, Stanton, George Verrall, and Robert Page. The married women would not be bound by the admission.

I do not forget that the defendants George Verrall and Robert Page are not themselves personal representatives, but only the husbands of two of the representatives. But this does not appear to me material; they join with their wives, and Stanton, in admitting that assets have come to their hands sufficient to answer the plaintiff's demand; and this, supposing the demand established, is, I think, sufficient to warrant a personal decree against them. If in truth the assets had never reached the husbands so as to be under their control, they ought to have framed their answer accordingly, but they raise no such point, and no doubt they have or had the entire control over the assets, and so could not have at-
 *278 tempted successfully to make the distinction * between their own receipts and the receipts of their wives. If this had not been so; if there had been no admission of assets by the husbands of the female defendants, but only by Stanton, still I should have been of opinion, supposing the claim to be established in point of fact, that there might have been a decree against Stanton alone. It is, however, not necessary for me to decide this question, being of opinion that there is in fact an admission of assets warranting a decree against all the three male defendants, if the claim is made out in point of fact in the answers and evidence in the cause.

As to the facts of the case (which his Lordship very minutely examined), I must say, upon full consideration of them, that there is no doubt in my mind, any more than there was in the mind of Vice-Chancellor Knight Bruce or of Lord Truro upon them, and I shall therefore content myself with moving your Lordships that the decree should be affirmed.

LORD ST. LEONARDS. — My Lords, I entirely agree in the result at which my noble and learned friend has arrived, although certainly I do not concur in all that has been stated by him.

I think that the facts of the case admit of very little doubt. [His Lordship stated them very fully.] The memorandum was drawn by Stanton himself; it was signed by Mrs. Caney, and attested by Elizabeth Hammond, in her presence; he has since destroyed it; whatever might have been the state of mind of Mrs. Caney, he was sane when he drew it; he had heard the discussion which preceded the giving of it; he is a man, as the proceedings show, quite able and willing to look after his own interests; but he now impeaches the validity of the memorandum, which was not a simple acknowledgment of amount of * money, * 279 but was in words an absolute agreement that that was the amount due,—he now impeaches that agreement, on the ground that Mrs. Caney was then of unsound mind. Now, we are all perfectly aware that when by a finding upon a lunacy you carry back the lunacy, although it is *prima facie* evidence, it is not conclusive evidence. But can any man of common sense doubt that Mr. Stanton, meaning, as he evidently did, to impeach this transaction, which was his own arrangement, if he could have carried that lunacy backwards so as to overreach the agreement of 1839, would have done so? He made no such attempt, and therefore, although, speaking generally, the carrying back the lunacy to a particular period is not conclusive evidence that the party was at that period a lunatic, or that the party before that period was not a lunatic, yet in this case the absence of any such finding is very strong corroborative evidence, being an admission by Mr. Stanton himself, that the lunacy could not be carried back so as to impeach the validity of the agreement of 1839.

It is almost incredible that a man should appeal to this House after having been guilty of such conduct as appears before us in evidence. Mr. Stanton has gone from Court to Court, and in every Court he has met with the severest reprobation; and yet he hesitates not to come to your Lordships' House, the highest Court of Appeal in this country, with his conduct again to be examined, again to be impeached, and again to receive reprobation from the persons who have to deliver your Lordships' judgment.

In 1846, Stanton having refused payment any longer of the dividends to Mrs. Percival, her solicitor writes to him, and requests a copy of the agreement which he had kept in his own custody. Your Lordships will remember that he had the custody of the

* 280 agreement as the agent of both * parties.¹ As an honest man, he was bound to retain it for the use of both. As the holder of that agreement, every Court would have compelled him to produce it, and would have held him responsible for any spoliation of it after it had been signed by both parties and placed in his custody. Did he act in accordance with what the law required of him? No. To that application, made in 1846, he sends a denial, he refuses to give a copy of the instrument, and, in the subsequent year, having, upon Mrs. Caney's death, burnt a great many papers, we do not know what (which papers might have shown the whole of this transaction), he, being a committee of this estate, being himself the person who wrote the agreement, being the agent of both parties, and being the depository of that agreement for both parties, he absolutely burnt the agreement in order to defeat the claim of this poor woman, which is now about to be established at your Lordships' bar. Has he any excuse for so violent and flagrant an act? A spoliator must expect that every possible inference will be drawn against him. Has he any excuse for it? He says that he thought it would be no longer necessary, because the Master in Lunacy, not having discovered any transfer of stock from Mrs. Percival to Mrs. Caney, thought the claim could not be sustained. The result has proved that the fact was just the other way, but it was because no such transfer could be found, that that particular document, the agreement, ought to have been sacredly retained in the custody of Mr. Stanton, to which it had been committed. It was the only proof, according to his own statement, upon which Mrs. Percival could establish her claim, and because other proof had failed, and because this was the only docu-

* 281 ment which could give this poor * woman a right to recover her own property, he, the very person who had drawn it, and who had witnessed it in the presence of both parties, who had paid money under it for so many years, but who had an interest in defeating it, he, in spite of the application of the solicitor for Mrs. Percival, according to his own admission, actually destroyed it.

But he must have kept a copy of the document for his own purposes, because he sets forth in his answer, in inverted commas, the very words of this agreement. He took care, therefore, to

¹ See on the question of a third person holding a document as agent for two others, *Hamilton v. Hamilton*, 9 Clark & F. 327.

have that which he might make use of at some future time, although he had refused the paper to the party who was entitled to it. It is manifest that he kept a copy of it himself, or he had brooded over it so long before he committed so great a crime, that he could swear to the very words used in the agreement.

Upon these facts I confess that I have, first of all, a perfect conviction, not, as my noble and learned friend says, that the sum of 4300*l.* was the exact sum due, but that a large sum was due, — it might be more or it might be less ; and the parties themselves must be taken at the time to have known, much better than we can now know, what the sum was. Looking at all the circumstances of the case, I think it perfectly clear that the agreement was a binding one, which a Court of equity ought to enforce.

There are some points so clear that there ought not to be an argument raised upon them, and I was therefore rather surprised to hear one of the learned counsel endeavour to argue, strenuously and at some length, that there could be no remedy in a Court of equity in this case, but that the relief, if any, was only at law. If any thing can be clear as a question of law, it is this, that the agreement, executed by Mrs. Caney, assuming her to have been then a sane person, admitting that stock standing in Mrs. Caney's name was purchased with the money of and belonged to

* Mrs. Percival, was an agreement which a Court of equity * 282 would enforce, according to its ordinary jurisdiction. That point does not admit of a shadow of doubt.

Then if it stood simply upon the question of fact, we should only have one other fact to deal with, and that is the question of insanity to which I have already alluded. I myself should have been quite satisfied upon the dealings of the parties such as I have stated them, that the lunacy never could have been carried back further than the time to which they got the jury to carry it back, namely, 1842. But I have read all the evidence with very great care, and I agree in opinion with the learned Judges of the Court below, who thoroughly sifted the evidence, that however singular may have been the conduct of this lady, she was perfectly competent to manage both her own and her friends' money, up at least to the date upon which the validity of this agreement is to depend. As regards the question of insanity, I should advise your Lordships that the agreement could not be impeached on that ground, and consequently I should come to the conclusion, if there was no

other point in the case, that the agreement was such as must be enforced by a Court of equity in favour of Mrs. Percival.

But questions of considerable nicety arise, — technical objections, certainly, but at the same time technical objections of a nature which would carry with them substance, if they could be maintained. The first objection was not raised till a very late period in the argument before the Vice-Chancellor; and therefore, although it may be entitled to great weight, it was an afterthought, and the counsel did not go to the hearing prepared to argue it. It was said that, answers having been put in to the original bill by the lunatic and by her committees, the answer of the committees could not, after the death of the lunatic, be read against

* 283 * her, or against her representatives. This introduces a very important question, and one upon which my noble and learned friend has expressed an opinion in which, I regret to say, I cannot concur. It appears to me, after a great deal of consideration, that the answers of committees may be read against, as it is called, the lunatic. I do not say that the answers must in every case be read so as to be taken as conclusive; I can easily imagine many cases in which the Court would be of opinion that, from want of knowledge on the part of the committees, from the nature of their defence, and so on, the answer should not be deemed binding, and that it would be a proper case for inquiry, particularly having regard to the character of the defendants, the committees. I have no doubt that such cases might occur; but on the mere abstract question, whether you have a right to read such an answer, I should say that you have the right.

Supposing this decree had been made in the lifetime of Mrs. Caney, and that her next of kin had attempted to impeach it, as made upon the answer and upon the evidence, could that attempt have succeeded? It may be said that this is *idem per idem*. I do not think it is so; but at all events, I do not apprehend, unless some new ground had been stated, that a decree so made against Mrs. Caney in her lifetime could have been impeached; I do not apprehend that that would admit of doubt. It is singular that there is no direct decision either one way or the other; but as far as the cases go (though I may say at once they are not satisfactory by any means), they are in favour of the answers of the committees being binding; and such also is the statement in the text-books.

My noble and learned friend says, very truly, that according to the definition in the books, the committees are to be looked upon as bailiffs; and so they are. But * it does not follow, * 284 because they are termed bailiffs, namely as receivers, that while they occupy that position they do not represent the estate. In their character of committees they are bailiffs for the purpose of receiving and accounting, but that does not exclude or settle the question what is their character as committees with regard to the estate.

Your Lordships are aware of the distinction at law between the cases of idiots and lunatics. The Crown, according to law, though not by practice, actually takes the estates of idiots properly so called, and maintaining the idiot, and keeping his property in order, the Crown is entitled to the rest of the estate. In the case of lunatics it is otherwise. The Crown does not take the estate, but it takes actual possession of the estate; it takes the guardianship of the estate; it takes the whole power over the estate, not for the purposes of adverse possession, but for the purposes of protection to the lunatic, and for the preservation of the property. The Crown has the power to delegate its functions, and that power is generally delegated to the Lord Chancellor, though not necessarily so. The Lord Chancellor has one general power, instead of a particular power upon every occasion. He appoints committees, and those committees have a grant of the custody of the person, as in this case, and of the estate which places them in the position of representatives of the lunatic and of her estate.

Well, then, suppose a bill to be filed in this case against the lunatic and against the committees, you must have as parties the lunatic, because the estate is in her, and not in the committees; you must have the committees, because they are the persons who by law represent the property in the estate; they are the persons who have to protect it and defend it against all comers. They are called into a Court of equity, they are necessarily made defendants, and are put upon their oaths; and, if by their answers, speaking upon their oaths, to facts * within their * 285 knowledge, they can defend the interests of the lunatic, why may they not also bind the interests of the lunatic? If the Court, after reading their answer, thinks that the case requires no further investigation, why may not they bind the interests of the

lunatic by the admission of facts within their knowledge, instead of compelling the parties to pursue a fruitless litigation ?

You will remember the position in which the committees stand. They are nominees under the Great Seal ; they are, in point of fact, indirectly the nominees of the Crown, representing the rights and interests of the Crown, and the duties and obligations of the Crown towards the particular lunatic. Why, therefore, should not their admission upon oath, in answer to a charge claiming a particular interest (whilst it has its full weight as a defence), have the other necessary consequence of a defence, viz. that it may be taken, not necessarily as conclusive, but may be taken into consideration, or made the subject of further inquiry ? Unless the Court sees that it is a defence that could not be altered by further inquiry (in all probability the Court would direct inquiry, — I am not saying a single word which would take away from a Court of equity the right or the duty of directing an inquiry if the case called for it), why should not the answer of these committees be admitted ? They have a solemn trust confided to them, and you call them before you, and compel them, upon oath, to answer from their own knowledge the case set up. They stand in Court as the representative of the Crown with this lunatic in their care and custody, and with the care and custody of the estate ; and they represent to the Court upon their oaths what the real state of the case is. It would be a mockery of justice, as it appears to me, to say that in principle their answer is not to be admitted.

Nobody denies that the answer may be read as a defence,
 * 286 * and in my opinion it may equally be read against the parties who make it ; that is, you are to take it as an answer whether it has the one or the other of two effects ; it may bind, or it may release ; it may defend, or it may not be a sufficient defence ; it may operate as an admission, or may turn the plaintiff entirely out of Court.

It is not, however, correct to say that you read the answer against the lunatic ; a man's answer is not against himself, it is made in support of himself ; it may turn out not to be an answer that will support the claim that he makes, but still it is his answer and his defence ; and so in the case here it is an answer, it is a defence ; it may be an ineffectual defence, but it is a defence ; if it is a good defence it operates, if it is a bad defence it fails.

Now, as regards the authorities, it is singular enough how they

stand. I agree with my noble and learned friend that very little satisfaction is to be obtained from an examination of them. I will dispose of them in a very few words. The case of *Leving v. Caverly*¹ was this. [His Lordship read it; see ante, p. 264.] The only use I make of that case is this: it shows that there is no principle against the answer being read. The Lord Keeper had no conception at that period that there was any rule or principle that the answer of the committees could not be read, because he was of opinion that the answer of a superannuated defendant by guardian could be read. The guardian may know nothing of the facts, and the superannuated person is not capable of answering, and upon those grounds another guardian may be appointed. Still he was of that opinion in that case, which shows, therefore, that up to this period nobody knew of such a rule of law as that which is now contended for.

* Another case, *Freeman v. Grady*,² was cited, as showing * 287 that that was not so, and that in Ireland this point had been considered otherwise. That case is undoubtedly contrary to the other, and if the Court there had considered that other case, and overruled it, I do not know what would have been the consequence; but the case having stood over, the Master of the Rolls makes this observation: "I have looked into the authorities in relation to this question, and I cannot find any case in which a decree was made upon the answer of the guardian *ad litem* of a superannuated person. The case of a superannuated person is different from those of a lunatic and a minor." If I understand those words, he means to say that in those two cases it would prevail, but not in the other case. We know that in the case of a minor it may be read. Certainly there is nothing to warrant the assertion that that is a case in favour of the position, that you cannot read the answer of the committee against the lunatic; on the contrary, it appears to me to tell the other way.

In the case of *Crawford v. Kernaghan*,³ there was a motion to take a bill *pro confesso* against the guardian *ad litem* of a lunatic, and the following order was made: "Let the plaintiff's bill be taken as confessed, for want of an answer, as against the defendant, James Kernaghan, and let further directions as to the relief to be thereupon granted be reserved until the hearing of this cause

¹ Prec. in Ch. 229.

² 1 Drury & Wal. 195.

³ 8 Irish Eq. Rep. 137.

against the other defendants, and let the plaintiff serve this order forthwith on the nearest relations of the defendant, James Kernaghan, and on James Kernaghan, junior." So that actually there was a decree taken *pro confesso* against a lunatic and his nearest relations.

In Mr. Daniel's book of Chancery Practice¹ is this * 288 * statement: "The rule which requires the trustees of property in litigation to be brought before the Court requires the presence of the committees of the estates of idiots and lunatics in a suit against idiots or lunatics committed to their care, because by the grant to them of the estates of such lunatics or idiots, they are constituted trustees of such estates"; and elsewhere the author states that in effect their answers are binding. Several other treatises and text books which I have looked into state the same rule, that the answer of the committees is binding. That is by no means conclusive, of course, but it shows what the current of opinion has been. The passage which I have quoted, no doubt, is far from being correct, because it does not draw a distinction between the case of idiots and the case of lunatics. It is not true that by the grant of the estates of lunatics the committees are constituted trustees of those estates, because they do not take the estates *quâ* legal estates. The estate is not vested in them, as I have already stated to your Lordships, though, in point of fact, they are, in an ordinary sense of that expression, trustees of those estates.

There was before the same Judge who pronounced the first decision here the case of *Micklethwaite v. Atkinson*; ² and there the Court held, without giving any opinion on the several points, which were very much discussed, "That the plaintiff cannot except to the answer of the defendant, who is of unsound mind, but against whom a commission of lunacy has not issued." The whole of that learned Judge's opinion seems to point to this, that if a commission of lunacy had issued, the case would be different; for he relies entirely upon the fact of a commission of lunacy not having issued, and therefore he is dealing with that case

* 289 * differently from what he would have done if it had been a case in which a commission of lunacy had issued.

I requested my noble and learned friend on the Woolsack to make inquiries of the clerks in Court as to what had been the

¹ Vol. I. p. 246.

² 1 Coll. Ch. 173.

practice. The following are the questions which I asked, and the answers that have been returned. Mr. Walker, of the Registrar's Office, states: "Diligent search has been made in this office, and I have myself made inquiries of two of the present and one of the late masters, to whom references upon exceptions to an answer were formerly made, and also of their clerks, and of the clerks of records and writs, as well as of two of the present taxing masters, formerly clerks in Court; and as to the first question, Whether exceptions have been allowed to the answer of a committee of a lunatic? I am unable to ascertain whether such exceptions have ever been allowed or not.

"With respect to the second query, Whether an immediate decree has been made upon bill and answer, where the defendants are a lunatic and his committee? the clerks of records and writs are not aware of their having granted a certificate to set down any such cause to be heard; but they say, if applied for, they should not hesitate to give one.

"Upon the third question, Whether the answer of a committee has been read as part of the plaintiff's evidence in such a case, I beg to say that before the statements in decrees were abolished, such answers were always set forth in them; but whether, if entered as read, they were so as part of the plaintiff's evidence, never appeared on the face of the decree. The only case I have been able to refer to in the registrar's books, when a lunatic and his committee answered, is *Owen v. Davies*, Reg. Book B, 1747, fol. 451. The bill was for a specific performance by the purchaser; * and the lunatic, by his committee, admitted *290 the contract, and divers transactions of a complicated nature, proofs of which were entered in the decree, but not the answer as read.

"With respect to the fourth question, Whether the decrees in cases where a lunatic and his committee are defendants have been distinguished from other cases, in regard to statements as to the reading of the answer? I believe I may decidedly say that no such distinction has been made in drawing up the decrees."

The answers given to these questions are very strong in favour of the view which I entertain upon this subject. The case to which reference is made of *Owen v. Davies*,¹ came before Lord Hardwicke, and is a very well known case. There the party had en-

¹ 1 Ves. Sen. 82.

tered into a contract for the sale of an estate ; he became a lunatic after the contract ; and Lord Hardwicke makes this observation : “ There is no imputation by any of the defendants as to the value of the contract and the consideration, which is agreed to be reasonable, and delivers the Court from a great difficulty. The question then arises upon what terms it is to be performed, whether interest is to be paid, and from what time ? ” It is quite clear that in that case his Lordship referred to the answer, as that which relieved the Court from a great difficulty. With all deference to the opinion of my noble and learned friend, I have come to the conclusion, upon which I should have been perfectly satisfied to act, if I had had myself to decide this case, that this answer can be read as the answer of parties binding the estate.

If that should fail in point of law, then comes the next question as to the adoption, or not, of the answer by the present defendants. One thing is quite clear, and I * entirely agree with my noble and learned friend in that. It is clear upon authority, as well as upon principle, that if a committee puts in an answer in that character, he will be bound for all time to come by that answer in any other character which he himself may subsequently possess. For example, in this very case Mr. Stanton put in his answer to the bill as a committee, and subsequently put in his answer to the bill of revivor, as one of the next of kin and administrator ; he is certainly bound by both the answers which he put in, and he would have to remove that obligation by some new defence, if the Court would permit him to make it. But that which he swears must be taken to be true, and this, after all, goes a long way to show what I have contended for on the first point, that his answers are binding. That they are binding to a considerable extent no one doubts ; that they bind the committees in any character that they may subsequently acquire, is perfectly clear ; and, as it appears to me, they are also binding to a larger extent, and, as I have already stated, they are binding against the lunatic.

I am clearly of opinion that the expressions used in the answer to the bill of revivor are sufficient to amount to an adoption, by the defendants to that bill, of the answer of themselves, the committees, so far as they are the same persons, to the original bill. There is nothing to prevent them from being so, and it must be considered, therefore, as an adoption by them, in that new character, of the first answer.

As to the propriety of the decree against Mr. Stanton, it admits of no doubt. Mr. Stanton was properly made a defendant to the original bill in the character of a spoliator, independent of his character of a committee. If a man holds, as an agent, as he did, an instrument, and destroys it, he may be brought before the Court as a defendant to the suit to * establish the right, * 292 in order to obtain evidence from him, on his oath, as to the contents of that instrument, and his spoliation of it, and therefore nothing can be clearer than that Mr. Stanton was properly made a defendant to the suit, even in the character of a spoliator, and as answerable at all times, lunacy commission or no lunacy commission existing; and whether Mrs. Caney was dead or alive, he would be answerable for all time in that suit as a defendant, and as a spoliator, and the decree against him would be perfectly a matter of course.

But then it is said that if the answer is adopted, there having been no replication, you must take the whole of the answer as it stands. Now that introduces another question. In the first place, no replication to an answer to a pure bill of revivor would be necessary. If the defendants had desired to make a new case, let it be borne in mind that there was nothing in the rules of the Court to prevent the next of kin and administrator from also making a new case. The defendants did attempt, at a subsequent period, to obtain leave to make a new defence, and to put another answer in, and to raise by that answer the defence of the Statute of Limitation, and they failed in that application. But there is no appeal against that order, and consequently they have submitted to the order of the Court that they were not at liberty, as the pleadings then stood, to raise a new defence. They stand, therefore, upon the old defence, and the question comes simply to this: Is it or not the law of a Court of equity, that, supposing you read the answers, you must implicitly believe them? In a case in which there is evidence, as in this case, and in which there is an answer, supposing the whole answer read, is it a rule, either in law or at equity, that you must read the whole, and that, reading it, you must believe it? I think that that is not the rule. Some observations were made on that point * in the case of *Ber-* * 293
mon v. Woodridge,¹ in which Lord Mansfield makes this remark: ² “ It is said, that as the case rests entirely on the evidence

¹ 2 Dougl. 781.² 2 Dougl. 788.

of the captain, you must take it altogether, and believe the whole ; but though the whole of an affidavit or answer must be read, if any part is, yet you need not believe all equally. You may believe what makes against his point who swears, without believing what makes for it."

Then Mr. Starkie¹ thus states the rule : " Although the whole of an answer must, in general, be read, the rule decides nothing as to the credibility of any fact which it contains: this must depend upon circumstances."

In *Blount v. Burrow*,² a previous case, of *Talbot v. Rutlege*, is referred to, where Lord Chancellor Hardwicke observes, that as to reading an answer against a party, the rule of the Courts of law was too large, and that of the Courts of equity too confined ; " that one part of an answer in this Court may be read against a party, without reading the answer throughout ; but at law it is otherwise ; and if the Judge at law considers, that though the whole of the answer is read there, yet every part of the answer or examination is not of equal credit ; (*sic*) he thought the rule of law to be preferred."

Then in *Roe d. Pellatt v. Ferrars*,³ Mr. Justice Chambre makes this observation : " The point which in this case has most embarrassed my mind, is the degree of positive proof drawn from the answer in Chancery of the lessors of the plaintiff in their own favour. It is true that it was introduced into the cause by the defendant, on whose behalf some parts of the answer were read.

But in those parts on which the lessors of the plaintiff * 294 relied, they speak only * to what they ' have heard as truth.' I think that was not admissible evidence, for it appears to me that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for a discovery." And that has been the rule of the Court ever since.

These authorities at least show that there is no rule of a Court of equity which says, that although you read the answer, and give

¹ Ev. Vol. I. p. 384.

² 2 Bos. & P. 548.

³ 4 Brown, C. C. 75.

it its fair weight, you are implicitly to believe the whole of it. If you have evidence in the case, and that evidence not contradicting the answer, but clearing up things sufficiently to enable you to decide the case, giving a fair weight to the answer, I should be of opinion that you are entitled to read the answer according to what appears consistent with the circumstances, and that you are not bound to take the contents of the answer as true, and to shut your eyes and your ears to all the rest of the evidence, and the circumstances of the case.

Now let us just look at the case before your Lordships, as to the fact of the agreement being proved, and as to its value. Is that agreement well proved or not? You have the evidence of the contents of the instrument. If you look to Mr. Stanton's answer, he tells you the contents of the instrument which he has destroyed. If he had not improperly destroyed the instrument, Mrs. Percival would have had a right to move for its production, and the production of that paper would at once have established her claim. It is only by his act of spoliation, from which no Court of law would ever allow him to derive the slightest benefit, that he is enabled to raise this question at all. * Then * 295 what is the objection raised? I must read the answer in order to get at the terms of the agreement. I do read it, and I find circumstances with which I should have been satisfied as a Judge, if I had had to decide this case, that there must be a decree for the plaintiff. I should have ascertained the exact sum agreed on as the sum belonging to Mrs. Percival by reference to the amount of dividends paid to her in those years following the year 1839, so that I should have had no difficulty in the matter.

But then the statement of Mr. Stanton is accompanied by other statements, upon which he desires to impeach the agreement that he had drawn. I hold myself at perfect liberty, not to neglect what he has said, not to throw it aside, but I hold myself in a Court of equity quite at liberty, according to the principles of the Court, to read that answer with the attendant circumstances, and to judge what the real fact is from the complicated statement which he makes, and, upon his own statement (without reference to Elizabeth Hammond), as if he were a witness standing at your Lordships' bar, and there stating what he has stated on his oath in his answer, I should come to the clear and satisfactory conclusion that that was a binding and valid agreement.

Mr. Stanton could not ask more of the Court than that there should be an inquiry to ascertain what were the terms of the agreement so destroyed. Could there be a greater farce than that, when you have before you the statement on oath, of the man, against his own interest, who drew the agreement, of the exact terms of it, and also proof of its having been acted upon, — could there be any thing more disgraceful to a Court of justice than to direct an inquiry as to what the terms of the agreement were, in order that they might be proved ? By whom ? By the very same man (for there is no other person who can speak to * 296 * them) who has already stated those terms. You would have the mockery and delay of a Court of justice, driving this poor unhappy woman into the grave without those comforts of life which she ought to have derived from her property, but which have been unjustly withheld from her by the improper conduct of Mr. Stanton. If your Lordships were not to confirm this decision, you would have a new litigation commenced, not with this unhappy woman, who must die long before it could close, but with her representatives ; a litigation which might last for years, and then again come back to your Lordships' House. In point of law, I feel perfectly satisfied that the decision was arrived at rightly. I therefore fully agree in the view of my noble and learned friend, that this appeal should be dismissed, and with costs.

THE LORD CHANCELLOR. — I ought to state, that, in concurrence with my noble and learned friend, I communicated with Lord Brougham, who is now at a distance from London, but who heard the case argued. I sent him a full statement of the views which I had taken, and he has authorised me to state that he fully concurs in the result at which I have arrived.

Decree and order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 26 April, 1855.

* BARGATE v. SHORTRIDGE.

* 297

1855. April 23, 26, 27, 30; May 1.

GEORGE BARGATE and others, *Appellants*.RICHARD SHORTRIDGE, *Respondent*.¹

A banking company was established under the 7 Geo. 4, c. 46. By the deed of settlement of the company, it was declared that no transfer of shares should be permitted, except upon notice to the directors, and on the consent thereto of a board of directors, such consent to be signified by a certificate in writing signed by three directors at the least. If such consent was refused, the shareholder might require the directors to buy his shares at the market price of the day. After a consent given, the name of the transferee was entered in the share register book, and the entry there was conclusive against him. No shareholder could compel an inspection of the books of the company. S. was a shareholder; he desired to transfer his shares to different individuals, and he sent the proper notices to the directors; he received back consents signed by three directors, on which he completed the transfers; the transferees' names were entered in the share register book; and the returns made to the Stamp Office under the 7 Geo. 4, c. 46, omitted the name of S. from the list of shareholders, and inserted it in the list of those who had ceased to be shareholders. The transferees afterwards received the regular notices of meetings, &c. The directors subsequently sought to impeach these transfers, on the ground that the notices had never been submitted to a "board of directors," nor the consents given by such "board," but that the consents had merely been examined by the managing director alone, then signed by him, and afterwards signed by two other directors. It appeared that this mode of transacting the business of the company had existed ever since the formation of the company. *Held*, affirming a judgment of the Master of the Rolls, that such being the case, the directors could not in this instance set up their own want of observance of the formalities required by the deed as a ground on which to fix S. with liability as a continuing shareholder; their course of dealing bound them, and he was released.

A creditor of the company had sued the company and obtained judgment, and then at the desire of the directors, had issued a *sci. fa.* against S.; S. obtained an injunction to prevent the creditor from enforcing the judgment as against S.: —

Per LORD ST. LEONARDS: Where a company has, under the Act 7 Geo. 4,

* c. 46, made use of a creditor to proceed against a person, as a share- * 298
holder, when that person ought not properly to be placed in that position,
he is entitled to relief.

¹ Clarke v. Hart, 6 H. L. Cas. 643; Oakes v. Turquand, Law Rep. 2 H. L. 338; Spackman v. Evans, Law Rep. 3 H. L. 177; Evans v. Smallcombe, Law Rep. 3 H. L. 252.

If directors of a company do acts in a matter in which they have no authority, those acts are null and void; but if they neglect the acts which are within their authority, and which they ought to perform, neither a Court of law nor of equity will allow them afterwards to take advantage of their own neglect.

THIS was an appeal against a decree of the Master of the Rolls, made in a suit in which the present respondent was plaintiff, and the public officer and the directors of a bank at Newcastle were defendants, and which arose out of the following facts: —

In the year 1836 there was established a company called “The Newcastle, Shields, and Sunderland Union Joint Stock Banking Company.” It was established under the provisions of the 7 Geo. 4, c. 46,¹ and was regulated by a deed of settlement, dated on the 1st of October in that year. By that deed the general management of the affairs of the company was intrusted to eight directors, a person called a “general director” and seven others, who were to meet at the banking house at Newcastle once at least in every three months, and each meeting was to be styled a “Board of directors.” The nominal capital was to be 300,000*l.* in 30,000 shares of 10*l.* each, an account of which, regularly numbered, was to be kept as directed by the deed. One half of the nominal capital was paid up. To every person (§ 82 of the deed) executing the deed, and approved by the board of directors as fit to be a holder of shares, and after entry of his name in the register book as such holder of shares, a certificate was to be given, signed by three directors, specifying the number of shares, and the name and residence of such holder. And a new certificate was to

* 299 be given on any change in the holding of shares. By * § 84, a “share register book” was to be kept; and by § 85, the “board of directors should alone have power to make any entry, erasure, or alteration” in that book, which was not to be inspected without the permission of the board. By § 102, the general director was to provide that such accounts and returns should be made as were required by 7 Geo. 4, c. 46. By § 144, “no person should become or be registered as a shareholder without the consent of the board of directors, who might, on the application of any shareholder or other person entitled to dispose of any shares, testify the same by a certificate in writing, signed by

¹ See 1 & 2 Vict. c. 96.

three directors, in the form mentioned in the deed.”¹ By § 146, after the certificate of consent should be duly signed, and the deed executed, the proposed shareholder might require his name to be entered in “the share register book,” and after such entry, the former holder of the shares should have no claim or demand in respect to such shares. By § 148, in case the board of directors should refuse consent to any transfer of shares, they should on the request of the holder thereof, or other person entitled thereto, be obliged to purchase the * same, which * 300 they were thereby authorised to do, out of the funds and on behalf of the company, at a price or sum per share, to be fixed by the average of the prices or sums given on the ten next preceding sales of shares. From the very beginning the consents to the transfer of shares had been given by certificates, signed by three directors, but they had not been signed by three directors sitting together and forming “a board.” It had been a custom for one director to receive and examine proposals, and to sign the consent, to which the signatures of the other two directors (often appended at their own houses) were afterwards added.

The respondent in 1837 took two hundred shares in the company, which by subsequent purchases, extending to the month of May, 1847, he increased in number to six hundred and twenty. He received certificates in the usual form, and his name was inserted in “the share register book.” Between the 5th and 20th July, 1847, he disposed, to eight different persons, of all his shares through a broker in the usual manner. On the 27th of July, 1847, the usual half-yearly meeting to declare a dividend was held, and

¹ The following was the form given in the deed: “This is to certify that we the undersigned, three of the directors of the Newcastle, Shields, and Sunderland Union Joint Stock Banking Company, upon the application of (name and description of person or persons making the application), testified by his (or their) signing his (or their) name (or names) in the margin of these presents, consent that the shares numbered _____ respectively in the capital of the company, shall be transferred to (name and description, and place of abode of proposed shareholder), and that the name of the said _____ be entered in ‘the share register book’ of the company as the holder of such shares. Dated this _____ day of _____

Three of the directors of the Newcastle,
Shields, and Sunderland Union Joint
Stock Banking Company.”

the usual dividend of 10 per cent. on paid-up capital was declared. The transfers of the shares of the respondent were effected in the usual manner, and the last of these transfers was completed on the 28th August, 1847, on which day his name ceased to appear on the books of the company as a shareholder. On the 8th December, 1847, the return required under 7 Geo. 4, c. 46, of those who had ceased to be, and those who were then shareholders, was made by the directors to the Stamp Office. The name of the respondent was in that return placed among those who had ceased to be shareholders, the vendees received certificates, and were registered as shareholders, and afterwards received the ordinary notices of meetings, and the notices for a call.

* 301 * At the end of 1847 the Union Bank fell into difficulties, and calls were made on the shareholders. Two of the several persons to whom the respondent had sold his shares were persons who appeared about the same time to have also fallen into difficulties, and a demand of a call was then made on the respondent, as if he had still continued a shareholder of the company. The directors, on the 8th of January, 1848, wrote to the respondent: "They will not allow the transfer of 200 of your shares in the bank to Mr. —, nor of 40 of your shares to Mr. —, for want of the proper assent on the part of the board of directors to the sale and transfer of those shares in the manner prescribed by the deed of settlement." The respondent at once wrote back: "You will find that the transfer of these shares is not only allowed, and recorded in the books of the bank, but that such transfer is further confirmed, if necessary, by your own application to Mr. — and Mr. —, for their calls upon these shares as the holders of them. Had the objection to the transfer been taken at the time, I would then have required the directors to take the shares at the price of the day. See § 148." The directors replied: "The transfers of your shares to Mr. — and Mr. — were never brought before the directors at all, and therefore no assent could possibly have been given to them: if you had taken the steps necessary to place yourself in a position to require the directors to take a transfer of those shares to the company, such a proceeding would have had no effect in the case of an insolvent company, of which you are a member. No application has been made to Mr. — or Mr. — for payment of the calls on those shares."

The London and Westminster Bank having a large claim against

the Newcastle, &c. Union Bank, took proceedings to recover the same, and obtained judgment for 63,157*l.* * 12*s.* 6*d.*, and * 302 issued writs of *scire facias* against several shareholders who had not paid up calls. No writ of *scire facias* was at first issued against the respondent, as his name did not appear on the October return at Somerset House. The directors of the Newcastle, &c. Union Bank, on the 14th January, 1848, made an entry in the share register book against each entry of the transfer to the before-mentioned two persons, purchasers from the respondent, in the following terms: "The consent of the board of directors to this transfer not having been given, and this entry having been made without their authority, the alleged transfer is null and void." On the 1st of March, 1848, they made a new return to the Stamp Office, in which the name of the respondent was included as a member of the company. On the 24th January, 1848, the London and Westminster Bank, by its public officer, Mr. Bosanquet, commenced an action by *scire facias* against the respondent, to which he pleaded that he was not a member of the company. The cause was tried before the Lord Chief Baron, at the sittings after Michaelmas term, 1849, when the plaintiff gave in evidence the two returns of March, 1847, and March, 1848, and the altered entry in the share register book of January, 1848; but evidence of the return of October, 1847, tendered by the defendant, was rejected. A statement of facts was agreed on, and in addition to those already set forth appeared the following: That the said broker at the same time delivered the seller's certificates to the same clerk, and asked whether the transfer would be accepted, and the broker left at the bank the notice and certificates. That the clerk went into the manager's room, and coming back answered the broker in the affirmative. That the money was afterwards paid by the buyer on the 25th of August, and the buyer's broker applied to the bank for the new certificate of his (the * buyer) being the holder of the shares. That no consent * 303 of a board of directors was given by a board of directors to Mr. — becoming or being registered as a holder of these shares, but a certificate was signed by Chapman, the managing director, not at a board, but separately by himself, and afterwards sent on by him to Mr. Brown and Mr. Atkinson respectively, who were respectively directors, and who respectively signed the same separately at their private residences, not at any board, and returned it

to the managing director. That for the last five or six years, the same course as that above described had been always pursued on the transfer of shares, no consent of any board of directors having ever during that time been given to any transfer of shares. That many circulars were issued by the directors to the shareholders, between the date of the transfer to Shortridge, and the alteration of the register in January, 1848; but that no such circular was sent to the defendant Shortridge until the 7th of January, 1848.

A verdict was then taken for the plaintiff, subject to a motion to enter it for the defendant. The case was argued in 1850, and on the 8th of July in that year Mr. Baron Rolfe delivered the judgment of the Court of Exchequer in favour of the plaintiff.¹ While the case was still under consideration in the Court of Exchequer, namely, on the 19th April, 1850, the respondent filed his bill in the Court of Chancery against the public officer and directors of the Newcastle, &c. Union Bank, setting forth all the above facts, and praying that the defendants (the present appellants) might be restrained from using his name in their said company; that they might be directed to indemnify him against the demands of the London and Westminster Bank; that they might be declared

to have accepted the transfer of all his shares in their company, and that it * might be declared that he had not been
 * 304 a member of the company since August, 1847; that his name might be erased from the books, and that the company might be restrained by the order and injunction of the Court of Chancery from continuing his name on the share register book of the company, or in any manner treating him as a member; and that the Union Banking Company, and the London and Westminster Banking Company, might be restrained from further prosecuting any action against him as a member of the Union Banking Company after August, 1847.

The cause was heard before the Master of the Rolls, who in April, 1852,² granted a perpetual injunction against Bosanquet, restraining him from issuing execution in the action at law, and declared that the respondent, on the 28th of August, 1847, ceased to be a shareholder in the Union Banking Company, and the public officer of that company was enjoined not to place his name on the register book, or on the return made to the Stamp Office. This was the decree now appealed against.

¹ 4 Exch. 699.

² 16 Beav. 84.

The Solicitor-General (Sir R. Bethell) and *Mr. Selwyn* for the appellants. — There can be no difference in this case between the operation of rules of law and of equity. At law the respondent has been declared to continue a shareholder. He has no equity to set up, to defeat the effect of that decision. The judgment of the Master of the Rolls was made to depend on a supposed collusion between the two banks; but that was not the matter properly before the Court. There is no doubt that the share register book is conclusive on the question of shareholder or not; but that book must be kept as ordered by the board of directors, and any alteration made in it without their authority is null.

* The mere entry in the book does not show that the re- * 305
quired forms have been duly complied with; nor does the simple statement that that was so, produce any such effect, nor can it be binding on the board or on the company. The respondent may have a right to proceed against the directors for not doing what he lawfully required, or to call on the purchaser to proceed to the regular completion of the contract, but he is not in the mean time relieved from his liability as a shareholder. The real contest here is not between the respondent and the directors, but between him and the company.

[THE LORD CHANCELLOR. — The question is not between the same parties as in the Court of Exchequer. There it was between Shortridge and a creditor of the Union Bank; now it is between him and that bank itself.]

The question raised is the same, namely, whether he continues a shareholder of the Union Bank. Taking the case in the way the most favourable to the respondent, there are here two innocent parties; the question is, which is to suffer? Certainly not the company, but the man who did not comply with the laws of the company. The negligence of the directors cannot affect the company. It is clear that unless an agent acts in conformity with the rules settled for his conduct, the act done has no validity. The power of the directors, the agents of the company, was given, to be employed on certain conditions, and in certain forms; if not so employed the act is invalid: *Ex parte Morgan*.¹ There the directors had, but not in conformity with the provisions of the deed of settlement, purchased the shares of Morgan; and it was held that this irregular purchase, though made under the authority of a

¹ 1 Macn. & G. 225, 1 Hall & T. 324, 1 De G. & S. 750.

resolution of a general meeting, did not absolve Morgan
 * 306 * from his liability to be a contributor. *Ex parte Lawes*¹
 was decided on the same principle. In *Ex parte Bennett, in*
re Cameron's Coalbrook Railroad Company,² the Lords Justices
 affirmed a decision of the Master of the Rolls, holding that a share-
 holder who has, by an irregular act of the directors, been allowed
 to retire from the company, is still liable to be placed on the list
 of contributories. In *Keene's Case*,³ and in the *Great Western*
Railway v. Rushout,⁴ the same course was followed. The deed of
 settlement gives the law, which cannot be abrogated by the act of
 directors, or even by the vote of a general meeting. The mistake
 of the Master of the Rolls here was, that while he treated the share
 register book as conclusive, he assumed that the correctness of the
 entries there did not depend on compliance with the deed, but on
 the practice of the directors. Suppose the entry had been made
 by mistake, it would not be binding on the general body of the
 shareholders, nor will it be so if made, as it was here, by an
 irregular practice, contrary to the law of the company. *Straffon's*
*Case*⁵ does not overrule *Morgan's Case*; on the contrary, in
 deciding it, Lord Chancellor St. Leonards expressly stated⁶ that
 they were distinguishable from each other. The letter of the deed
 and the constitution of the company alone govern the decision of
 cases like the present, and the admission made in the Exchequer,
 that no consent had been given, must be acted on here.

Mr. Roundell Palmer and *Mr. Elmsley* (*Mr. Bates* was with
 them) for the respondent. — This appeal does not necessarily
 involve the decision of the case in the Court of Exchequer,⁷
 * 307 for they are * between different parties, on different states
 of facts, and are to be decided by different rules of law; but
 if the two cases are inconsistent, then it is submitted that that
 decision is erroneous. The individual shareholders have not
 merely the power but the right to transfer their shares. The deed
 shows how that right is regulated, and is to be exercised. If they
 do all that in them lies to observe the provisions of the deed, their

¹ 20 Law J. N. S. Ch. 295, confirmed on appeal, 1 De G., M. & G. 421.

² 18 Beav. 349, affirmed, 24 Law J. N. S. Ch. 130.

³ 3 De G., M. & G. 272.

⁶ 1 De G., M. & G. 589.

⁴ 5 De G. & S. 290.

⁷ 4 Exch. 699.

⁵ 1 De G., M. & G. 576.

right is duly exercised, and an irregularity on the part of the directors cannot affect its exercise. On the evidence here the consent must be assumed to have been duly given. The shareholders of this company were prevented from inspecting the books, and had no means of compelling the directors to follow the formal requisites of the deed of settlement. Their rights were, therefore, not affected by any negligence of the directors to do so. The 144th clause prohibits the admission of new shareholders "without the consent of the board of directors"; that consent is to be shown by "a certificate in writing, signed by three of the directors," who, for such a purpose, therefore constitute a board. No shareholder has the means of knowing in what way the three signatures are attached to the consent, but if they are attached and the alteration is afterwards made in the share register book, the transfer is, by the 156th clause, complete as between him and the company. All that was done here, and as most of Shortridge's own shares had been transferred to him in the same way in which, in July, 1847, he transferred them to others, the argument of the appellants, if good for any thing, would show that as to those shares he never had been a shareholder at all. Nay, the very existence of the company is affected by the argument on the other side, for the admitted facts prove that out of the whole 30,000 shares, of which the capital consisted, only 4245 were original and untransferred shares.

* [THE LORD CHANCELLOR. — If the transfers have been * 308 so made that the party cannot be considered liable to an action at the suit of an external creditor, what is the purpose of the interference of a Court of equity?]

It was necessary to appeal to equity, because the directors had tampered with the books. If the transaction appears valid at law, there is good ground for an application to equity. On the 20th October, 1847, there was a meeting to stop all further transfers, which, in fact, was an admission that all which had been before made were properly made, and the resolution then passed referred entirely to those which might be proposed after that date. What had once been done could not be retracted: *Holme's Case*.¹ The principle on which this House will act is shown in the case of *Piers v. Piers*,² where the long-settled mode of performing a certain act was recognised as explaining away a difficulty, occasioned by the

¹ 2 De G., M. & G. 113. See p. 126.

² 2 H. L. Cas. 331.

misrecollection of one of the witnesses. *Straffon's Case*¹ is directly in point with the present; and *Taylor v. Hughes*² actually decides it. There persons had been shareholders in a commercial and agricultural bank; no power existed in the deed for the directors to buy up their shares, but there was a general power for them to manage the affairs of the company. The directors ordered that the stock of a member should be taken at a certain price, and the transfer was executed, but in an irregular manner. They afterwards attempted to impeach what they had thus done, but it was held that they could not do so.

Here the formalities of transfer were dispensed with by the directors themselves: the respondent had no means of compelling the observance of them, nor could he even * 309 know that they were not duly observed. Under such circumstances the act of the directors who signed the consent was the act of the board of directors, and their course of dealing in this matter binds all parties: *Walter's Case*,³ *Gordon's Case*,⁴ *Bagge's Case*,⁵ *Cockburn's Case*,⁶ *Straffon's Case*.⁷ This mode of transferring shares, although not in conformity with the deed of settlement, had been adopted from the beginning, and the rule laid down by Lord Eldon in *Const v. Harris*⁸ applies, namely that alterations ought not to be made in a deed of partnership, except by the agreement of all, but that "if alterations were made by some of the partners and acquiesced in by all, the Court would hold that to be an adoption of new terms." That rule was stated and expressly affirmed by Lord St. Leonards in *Taylor v. Hughes*.⁹

Even in the case of Keene¹⁰ the transfer was held to be insufficient, not merely because formal requisites of transfer had not been complied with, but because in substance there was no proof of the allowance of the transfer by the company, for though there was an entry of Kluht's name in the company's books, the dividends subsequently due to his wife had been paid to the testatrix's executor, and not to her, and the entry appeared to be the mere unauthorised entry of the secretary.

¹ 1 De G., M. & G. 576.

² 2 Jones & L. 24.

³ 3 De G. & S. 149.

⁴ 3 De G. & S. 249.

⁵ 13 Beav. 162.

⁶ 4 De G. & S. 177.

⁷ 1 De G., M. & G. 576.

⁸ Turner & R. 496, 517.

⁹ 2 Jones & L. 24, 53.

¹⁰ 3 De G., M. & G. 272.

*Ex parte Bennett*¹ is not an authority the other way; for there a particular act was done which was clearly *ultra vires* of the directors, and could not affect the creditors of the company; and the proceedings in *Walters's Second Case*² were held void, because * there the requisites of the deed were said to be * 310 systematically violated. In all those cases too, the question related to the rights of strangers and creditors as against a shareholder whose shares had been irregularly transferred. Here the parties are not the directors, or a member and a creditor, but the directors and a member of the company; and the default as to the regularity of the proceeding is a default by the directors, and not by the respondent, who on his part has done all that the deed required.

The Solicitor-General, in reply. — The true and only point in this case is, whether the relation in which Shortridge contracted to stand with the company can be dissolved in any other way than is provided for by the deed. The answer must be in the negative. The directors are the agents of the company, and can exercise no authority to bind the company, except that which is given to them by the deed creating them agents. In some of the cases cited on the other side, such, for instance, as *Bagge's Case*,³ the acts done were held good notwithstanding the omission of certain required formalities, but that was because those formalities were impossible to be complied with. There was no such impossibility here, and therefore those cases do not apply to the present. In others the case had not been provided for. In *Taylor v. Hughes*,⁴ the deed said nothing as to the company purchasing shares, but the power which the directors exercised in purchasing them was thought by Lord St. Leonards to be necessarily existent in the directors.⁵ Here there could be no such inferential authority, for the deed expressly declared that no transfers should be valid, except they were consented to in a certain specified way, * and * 311 that case therefore has no bearing upon the present. In like manner *Walters's First Case*⁶ must be read in connection with *Morgan's Case*,⁷ and then it will be found not to be opposed to the

¹ 18 Beav. 339, 24 L. J. N. S. Ch. 130.

² 3 De G. & S. 244.

³ 13 Beav. 162.

⁴ 2 Jones & L. 24.

⁵ 2 Jones & L. 52.

⁶ 3 De G. & S. 149, 244.

⁷ 1 Macn. & G. 225, 1 Hall & T. 324.

argument for these appellants. The cases of *Bennett*,¹ of *Keene*,² and of *Lawes*,³ *Walters's Second Case*,⁴ is clearly in their favour, are directly in point with the present, and the last of them expressly establishes that even the resolution of a general meeting, and the acting on that resolution by the directors, will not have force to defeat the provisions of the deed.

1855. May 1.

THE LORD CHANCELLOR. — The Master of the Rolls, when he gave judgment in this case, prefaced it by the observation that it had occupied so much of the time of the Court, and therefore had allowed so many opportunities of considering the bearing of the different questions that arose, that he did not wish for further time before deciding it. I may say that that is entirely the situation in which I feel myself here. Upon communicating with my noble and learned friend, I find that we do not take exactly the same view of the case, but inasmuch as I rather think that he concurs in all particulars with the Master of the Rolls, and after hearing the case has come substantially to the same conclusion, it will not be necessary for me to detain your Lordships at very great length in stating the grounds upon which, on an examination of the authorities, I have arrived at a different conclusion.

Having been a member of the Court of Exchequer at the time when this case came before that Court, it may well be that * 312 the impressions which the discussion of that * case produced on my mind have been stronger than they would otherwise have been, and they may perhaps unduly influence me now. I have, however, endeavoured to divest myself of all preconceived opinions and of all feeling or impression arising from that circumstance, but, with every desire to do so, I confess that the conclusion to which I should arrive if this case now came before me for the first time is the same as that at which I did arrive when the case was before the Court of Exchequer.

In the case of joint stock companies the rights of the parties ought to be strictly regulated by the terms of the deed. When, as in the present case, a person becomes a shareholder in a company and executes a deed as a shareholder, with the stipulation

¹ 18 Beav. 339, 24 L. J. N. S. Ch. 130.

⁴ 3 De G. & S. 149, 244.

³ 3 De G., M. & G. 272.

² 20 L. J. N. S. Ch. 295, affirmed, 1 De G., M. & G. 421

in it that, as between himself and the other shareholders, he shall cease to be a shareholder by going through a particular course of proceeding, he may so cease by going through that course, but cannot cease to be a shareholder by any thing short of that. I doubt whether I might not go the length of saying that he could not otherwise cease to be a shareholder, even should the course thus prescribed be a mere matter of form. But when the stipulation as between himself and the other shareholders is, that each shareholder shall cease to be a shareholder only by the consent of a board of directors, given at one or more meetings of the board of directors to consider the propriety of permitting the transfer, I cannot treat that as a mere matter of form, but I must think that compliance with such a requisition is strictly a matter of substance.

The first question here is, whether Mr. Shortridge has ceased to be a shareholder in the mode in which alone it was competent to him so to cease. In the argument upon the case before the Court of Exchequer it was stated as an admitted fact, that there had not been the consent of a board of directors. It was argued here very strongly at * the bar, that though that was ad- * 313
mitted in the Court of Exchequer, it ought not to be taken as admitted here, because here we were not bound by those admissions that the case was to be looked at simply upon the evidence; and that, in fact, looking at all the evidence taken together, it must be assumed that there was the consent of the board of directors. I certainly cannot concur in that view. I think it is perfectly clear upon all the proceedings that there was not the consent of the board of directors, and assuming, as it was stated in the Court of Exchequer, that for five or six years, or as it was stated upon the evidence, from the first commencement of the company, there was no other mode of transfer, the important question is this: whether this mode is to be taken as a substitute for the mode stipulated for in the deed. It is, in truth, upon that point that the Court of Exchequer was at variance from the opinion expressed by the Master of the Rolls, and as it appears to me the Court of Exchequer was right. Assuming that there never was a transfer made in any other mode than that in which the transfer by Mr. Shortridge was made, still that is immaterial, inasmuch as that is not the mode stipulated in the deed as between Mr. Shortridge and his copartners. Mr. Shortridge, in my

opinion, therefore, never ceased to be a partner as between himself and them. That is shortly the view I should have taken of this case if my noble and learned friend had not differed from me, but when I find that the Master of the Rolls and my noble and learned friend take a different view of the case, it certainly tends to shake my confidence in the opinion which I entertain.

If the decision of this case had depended upon whether I should alter or not the opinion I had formed in the Court of Exchequer,

I should have taken further time to consider it, but as it is * 314 not material to the result, I have * not thought it necessary to take that course, but only to say that I am inclined to maintain the opinion which I before entertained.

There is one other point, however, to which I feel myself called upon to advert, in order that it may not be supposed that I have overlooked it. Even supposing the Master of the Rolls to be correct in his view of the law, I do not see that this was a case for an injunction; because, what the Master of the Rolls has stated is, not that Mr. Shortridge did not remain a shareholder, but, that for some equitable reason it was not proper that the appellants should assert against him in that character their legal rights. But the decree proceeds expressly upon the declaration that the plaintiff, on the 28th August, 1847, ceased to be a shareholder. If that is so, I cannot understand what necessity there was for an injunction at all. If he ceased to be a shareholder, then any action against him would be perfectly innocuous, and we must consider the case without reference to the fact that this action has been brought, and that in consequence of the arrangement between the parties bringing it before the Court, it has been erroneously decided. We must see what in substance are the rights which the plaintiff in this suit establishes to the satisfaction of the Court. The defendants have no legal right against Mr. Shortridge if he has ceased to fill the only character which could entitle them at law to proceed against him. Instead of a suit in equity to restrain the action, the proceeding should have been in the nature of a demurrer, but if the plaintiff has, according to the declaration in the decree, ceased to be a shareholder, to what purpose should you restrain the defendants from bringing an action?

I am purposely very short in the observations that I make.

* 315 I make them merely with the object of showing * the view

I take of the case as it stands. I am aware that in the result it is unimportant, and I do not wish to enter into a more elaborate discussion, because I believe my noble and learned friend, who is so familiar with this subject, will state his views, which concur with those of the Master of the Rolls, and I can only state that I shall be ready to acquiesce in the conclusion at which he arrives.

LORD ST. LEONARDS. — My Lords, I very much regret that my noble and learned friend on the Woolsack does not take the view of this case which impresses itself upon my mind. It is a question which I have often had occasion to consider, both in Ireland and in this country, and that, no doubt, may have produced a strong impression upon my mind, independently of the particular arguments urged in this case; and certainly the arguments urged upon the part of the appellant have not removed that impression.

The question, as I understand it, really is, whether a long course of dealing by a company, contrary, not to the real interests of the company or the *bona fides* of the transactions, but contrary to some of the terms of the deed under which the company was formed, shall or shall not be held to disentitle such company to object to particular rights acquired by that course of dealing, as acquired in disregard of the provisions of the company's deed of settlement.

I entirely agree with my noble and learned friend, that the question as to the effect of this disregard ought to be considered in the same manner in equity as at law. There is no equity, that I am aware of, arising out of these transactions, which ought not to be applied as a rule of law, and the question, therefore, simply amounts to this: Have the * directors or the share- * 316 holders by their contract precluded themselves from object- ing to the informality of which they themselves have been guilty?

I think that the decision of the Master of the Rolls may be maintained upon the ground upon which the case of *Taylor v. Hughes*¹ was decided. I am unwilling to refer to a decision of my own, but that case has been decided for a good many years, and has been acquiesced in. That case decided, that though the rule might be the same at law as in equity, yet where, under the Act of 7 Geo. 4, the company had made use of a creditor simply as a sham, as a tool to work against a shareholder, who ought not properly

¹ 2 Jones & L. 24.

to be, but who was, thereby placed at a disadvantage, because under the Act of Parliament he was open to difficulties to which he would not otherwise be subject as between himself and the company, the shareholder was entitled to relief. It appears to me the present is not distinguishable from that case. There the Act of Parliament was resorted to by the company in order to bind a shareholder who ought not so to have been bound as between himself and the company, whatever might be the rights of adverse creditors; and that constitutes the equity. I do not quite understand (and I agree with my noble and learned friend upon that) the ground upon which the Master of the Rolls ultimately put this case. He speaks of equities, without pointing out what he considers them to be. I desire it to be understood that, as far as my opinion goes, there is not any equity arising out of the dealings between the parties which would constitute a right in equity as contradistinguished from the operation and efficiency of those very same proceedings at law.

* 317 The case then lies in a very narrow compass. In point * of fact, the directors ought to have held, at stated periods, a regular board (they could have had other boards if they had thought proper to summon them), and they ought at those boards to have either assented to or dissented from the proposed transfer of shares. It is material to observe what the effect of a dissent was. It was to compel the company through the medium of a board of directors to purchase the shares, the sale of which to the proposed transferee was objected to by the directors. So that they never could object to a proposed sale of shares to a third person without imposing upon themselves the obligation of buying the very shares at a given price, according to a stipulation in the deed; and even where, therefore, the directors consent to a transfer, they do, by that consent, whether it is expressed in the form required by the deed or not, relieve the company and the funds of the company from the obligation to purchase those shares; so that, by every consent given, although irregularly, the funds of the company are relieved from that pressing obligation.

The way in which the business was managed appears to be this: the deed requires, in the ordinary manner, that the directors should consent if they think proper, or should dissent; that consent is to be given in a settled form, but that form is not rendered imperative. It is not that they shall, but that they may, give a certifi-

cate, in the form pointed out by the deed. The form is not imperative, but still a certificate was to be given by the board of directors. Now the evidence shows that, in point of fact, no meeting of a board of directors ever was held during all those years for the purpose of giving consent to or dissent from any one transfer that ever was made; and out of some fifty thousand shares which form the capital of this company, the title to forty-five thousand altogether depends upon irregular transactions; * that is, upon transfers made without the consent * 318 of the "board of directors," as required by the deed. So that what your Lordships, as a Court of justice, are called upon to do, is, to declare every one of the transfers of those forty-five thousand shares to be null and void, as regards the company and the persons who are entitled to those shares, and that, too, upon this ground, that the directors themselves neglected that particular form of proceeding to which they were bound by the deed to adhere.

I am sorry to refer again to my own decision, but it appears to me to be in point, and I submit it to your consideration: the distinction which I there took, and which I believe to be correct, was this, that if the directors do acts in violation of their deed, in a matter in which they have no authority, in that case it is not a question of mere form, for that form is substance. The thing is not within their power, it is *ultra vires*, and those acts are altogether null and void. But in a case like this, the act to be performed is within the power of the directors, where it is their duty to do it, and if they neglect to do it, and by their neglect damage accrues to third parties, a Court of law, as I apprehend, or a Court of equity, will not allow the company to take advantage of such neglect. That I apprehend to be a plain rule, and it is a rule which I will show to your Lordships is established by all the authorities upon this subject.

In this case the directors ought to have kept a transfer book, and also a share or proprietors' register book. That register book was the foundation of the returns, which by the Act of Parliament the directors were bound to make. Those books ought to be correct, not simply on account of the company, but on account of the obligation which the Act of Parliament imposed upon the directors to make out different returns. They were bound to make returns from * time to time of their existing mem- * 319 bers, and at the same time to make a return of those per-

sons who had ceased to be members. They never could do that according to the intention of the Act of Parliament unless those books were correct.

On looking at the books, it appears that although they have a heading for almost every part of the transaction that can be placed under a heading, there is no heading whatever under which they could make an entry, in regard to consents to or dissents from purchases and sales. I take it, therefore, that upon the very face of their own books there could not be a director or any other person who had access to the deeds and the books of the company, who must not have acquired a full knowledge of the fact, that from the beginning of this company's transactions to the time that it stopped general dealing, the directors never had upon any one occasion given a regular consent, in the manner required by the deed. It is no immaterial circumstance that the deed of partnership, if I may so call it, of this company, expressly excludes shareholders from having any right to inspect the books or documents belonging to the company. They could not therefore properly, nor possibly, know what the books contained. But the directors knew what the books contained. The general body of the shareholders only knew of whom the board was constituted ; and, in fact, speaking generally, most of them stood upon the same foundation, namely, upon transfers, made precisely in the same way in which transfers were made to Mr. Shortridge.

The way was this : the appellants had a managing director at the office ; he sat there ; he received the notices. In the first instance a notice was required to be given to the directors by the person proposing to sell shares, stating the proposed seller's
* 320 name, that of the proposed * buyer, and the price, showing the shares to have been regularly sold ; and every one of these transactions was carried in by the broker to the office, in order to inquire whether it was accepted or not ; and the managing director, sitting as a board, and representing the board, though of course he did not constitute a " board," sent out word to the clerk that it was accepted. Then after having himself signed the transfer in consequence of that supposed consent or certificate, the plan was to send that certificate to be signed by two other directors, and the certificate was delivered out to every purchaser, signed by three directors. Upon the face of it, the purchaser could not possibly tell that that was not a valid instrument. In point of fact,

the instrument was a valid one as regarded itself, and the directors cannot be heard to say, after such an universal dealing, that the transfers are null and void. The rights of the general body of the shareholders depended very much upon this formal mode of transfer. The directors neglected the intermediate steps. It was not that their subsequent steps were not right, or that the certificate was not a proper consent under clause 144 of the deed ; the certificate itself was right, and where a purchaser was himself already a shareholder, in that case he signed the receipt, which receipt, by the deed, is an exoneration to the seller from future liability. It happened in this case that a man buying, who was already a shareholder, signed the receipt. That was a discharge according to the deed ; but then the preliminary consent had not been given *modo et formâ* according to the deed. The directors chose to neglect that form, although it was a duty incumbent upon them to observe it.

In the returns under the Act of Parliament, which are placed before the public in order that they may have the security of a return upon oath, showing who are the * members for the * 321 time being of the company, a statement was regularly made, founded upon these transfers which are now objected to, showing that the transferee had become a member of the company where he was not so before, and showing that the transferor had ceased to be a member, and consequently, under one of the clauses in this deed, if the proceeding was binding upon the company, he thereby became released from further liability. The clause is express to that effect.

The deed provides that there shall be no alteration in the registers, except by the directors themselves. They can therefore alter the register, of course, upon the transfer ; that is a matter within their duty. Here the registers having been properly altered and made conformable to the real facts of the case, the appellants, in order to raise this question, and to endeavour to attack Mr. Shortridge through a creditor, after difficulties had come to light (not that they had recently arisen, but they had been concealed, and the directors had been acting carelessly and improvidently), looked round to see whether the transfers could be impeached, so as to bring in solvent parties and make them liable to the creditors. They thereupon made this alteration, which led to the decision in the Court of Exchequer.

I cannot think that the case in the Court of Exchequer precludes the equity which is now insisted upon. Because, supposing *Taylor v. Hughes* to be right, I think that the Master of the Rolls was right in holding (for that was in fact the ground upon which he proceeded) that the directors having made use of the name of a creditor in order, indirectly, to charge Mr. Shortridge, whom they had properly discharged before (not properly with reference to the regularity of the consent, but still properly in point of law), that raises an equity which entitles him to be

* 322 * relieved. So that, assuming the case in the Court of

Exchequer to be right, it does not break in at all upon the equity which Shortridge is entitled to here; for that case was a decision under a particular Act of Parliament, giving the creditor a right which is not now the question at issue. The question in the present state of the record, as it comes from a Court of equity, is this: What are the rights of the company *quâ* company against this individual Mr. Shortridge, who had been a shareholder, but who, as the directors had themselves declared, had ceased to be a shareholder? That is the question; not whether, under the Act of Parliament of 7 Geo. 4, a creditor could or could not have gone against this particular party. That point entirely alters the view which the Court, I think, should take of the case, and it introduces the real parties to discuss the question. In the Court of Exchequer the case was partly considered to have broken down, because the Court there excluded the evidence of that particular return which, by the effect of it upon the register, had discharged Mr. Shortridge as a shareholder. The register was excluded from the view, as I understand it, of the Court of Exchequer. It was brought before the Court of Equity, and is now before your Lordships, and the case cannot now be decided without reference to it. That in itself introduces a very different question.

But I should not be acting fairly to your Lordships if I did not say, with all the respect and deference which I feel for decisions of the Court of Exchequer, that even upon the evidence then before that Court, such as it was compared with the evidence which is now before your Lordships, I fear that I should have been very much disposed to differ from that decision, because it does appear to me that if by a course of action the directors of a company neglect precautions which they ought to attend

* 323 to, and * thereby lead third persons to deal together as

upon real transactions, and to embark money and credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn round and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained how the fact was. The objection to their doing so is all the stronger when nine tenths or more of all the shareholders must themselves stand in the same situation. It appears to me open to very considerable doubt whether the view taken by the Court of Exchequer was correct.

But supposing it to have been right, you have here evidence that this was not simply a practice of five or six years, but the uncontradicted evidence shows, the books show, the very headings of the books in all parts show, that from the very moment of the constitution of this company, down to the moment when embarrassments induced the directors to take these false steps (for false they appear to me to have been), there was a universal disregard of the directions of the deed which required consents to be given in a particular form. We find these directors going on during the whole period of the company's existence, neglecting a particular form, which form is substance, I admit, but which was not attended to in the manner required by the deed, though it was attended to in every other respect. Nobody pretends to say that the company suffered the slightest loss from the disregard of the terms of the deed, as to giving consents. The directors chose to deal generally with all the world, not simply with their shareholders, be it recollected, but with the world outside the company ; they chose to deal with individual shareholders as purchasers and sellers in the company, and to disregard the particular provision which they ought to have observed. In point of fact, nobody * can come into the company without the consent * 324 of three directors, and the deed requires that that consent shall always be obtained from a "board of directors." The board of directors delegated that power into the hands of three directors, who did consent to these transfers. The directors never desired to buy the shares ; they avoided that obligation by the consent, and they were content to carry on their business upon a new rule. They did not at all abrogate the necessity of consent, for no one man was ever introduced into the company without consent and full knowledge, but they thought fit to let the form slip out of their deed ; and in their books they make headings of

all facts, excluding that particular fact, but including every thing which would have followed as a necessary consequence upon a consent, if it had duly been given. So that if a consent had been given, as in point of fact that which was equivalent to a consent really was given, then every succeeding stage was perfectly regular.

Now, in point of equity, your Lordships are asked to say that after all this course of dealing, the directors can avoid every one of these very numerous transactions, because they did not themselves attend as a board, and duly make the consents. Without going further into this case, let us see how the authorities are, as regards the question whether the directors have or have not, by their own acts, bound the company, or whether the shareholders have or have not bound themselves by their own acts, for I hold the two things to be reciprocal. If the directors neglect a form or an obligation which they ought to perform, and which they could perform, they cannot afterwards raise an objection of that want of form or neglect of form as against the person with whom they have been dealing; and on the other hand, an obligation rests upon the shareholder coming into the company, and he

* 325 cannot, to relieve himself from his obligation, * raise an objection to want of form, if he really has become *de facto* a shareholder.

With regard to the authorities, there are several. I will refer to the last one, which I do especially, because it was the decision of the Court of Exchequer. In the *Sheffield, Ashton, and Manchester Railway Company v. Woodcock*,¹ a person had received a transfer from the company, with a blank for the name; there was a misstatement of the consideration, and he sent that in to the secretary with a desire to have it registered, and it was registered. He afterwards endeavoured to relieve himself from the obligation of a shareholder on the ground that this was a void transfer, but it was held that he was precluded from raising any objection to its validity. That is how the matter is regarded at law, and there are several recent cases to the same effect.

The *Case of Straffon*,² which was before me in the Court of Chancery, and which I am therefore unwilling to refer to as an authority, except that that also has been acquiesced in, certainly laid down the law (whether rightly or wrongly) upon which I am asking your Lordships now to act, that a company would be

¹ 7 M. & W. 574, 2 Railway Cas. 522.

² 1 De G., M. & G. 576.

bound, though neglecting to perform ceremonies which ought to be performed, and consequently that the shareholders would be bound by their general conduct. That case was decided upon that ground. We do not, however, depend upon that single authority, because I do not myself see any distinction between this case and the case which came before Lord Langdale, of *Ex parte Bagge*,¹ because, though the question there was a question in regard to contribution, yet it was a * question be- * 326
tween the company and a shareholder. There the directors had a right to buy the shares from the shareholders, but they were to pay a price according to the transfer register book, which they were bound to keep. They kept no such book, and they bought the shares without reference to any such book, for they had none, and then they insisted that that was not a binding transaction upon them, and that the shareholder was not relieved from his obligation as shareholder, because they, the directors, had neglected to keep that book, by the terms of which alone the parties could be regulated and guided in the purchase. The learned Judge who heard that case was clearly of opinion that the directors were bound; he says:² “Having neglected to keep a ‘share register book,’ not having delivered out any certificate of the shares held by the shareholders as directed by the deed, having afterwards dealt with a holder of scrip as a shareholder, having bought the shares mentioned or referred to in the scrip certificates, and having afterwards treated the same person as having ceased to be a proprietor, I think that they are not entitled to treat the transaction as void merely because there had not been an observance of those forms, which their own irregularity and neglect had made it impossible to observe.” That is the same point as in this case. It is a question of principle, and that is exactly the rule that I had already laid down in the case of *Taylor v. Hughes*.

Then *Ex parte Cockburn*³ and *Walters’s Case*⁴ are upon principle, as it appears to me, exactly the same as the present. In the latter the formalities had been universally disregarded, and the learned Judge there says:⁵ in conformity with what every other learned Judge has also laid * down upon this * 327

¹ 13 Beav. 162.³ 3 De G. & S. 149.² 13 Beav. 171.⁴ 3 De G. & S. 156.⁵ 20 Law J. N. S. Ch. 137.

point : "The formalities required by the deed may not have been, and I assume them not to have been, strictly attended to, or wholly carried into effect ; but throughout all the transactions that have been brought before the Court by these discussions, it appears that the requisitions and conditions of the deed were (I may say) systematically disregarded ; and if you are only to look to the deed, — if you are only to look to the provisions of the deed, — there would be no partnership and no company at all, as it seems to me. There must be taken to have been an universal assent, as it seems to me, to disregard its provisions," and so on ; and he held that transaction to be a binding transaction. Here has been an universal disregard of that which was a very proper provision, but the substance of it was at least adhered to ; it was never neglected ; no man was allowed to transfer without the consent of three directors, and when the certificate was called in, which was regularly done, the certificate appeared to be perfectly regular, and so it would have been in every respect if the previous consent had been given in the way in which it ought to have been given, but the directors passing over that were bound, as it appears to me, by their own proceeding.

Now my noble and learned friend, as I understand, would, in the Court of Exchequer, have considered it open to much doubt, what the operation might have been of the practice of five or six years, provided it had not been there stated, which it was, that the consent had never been given. The Court of Exchequer, in a case of great embarrassment, found it stated that there was a practice of five or six years, and my noble and learned friend thought that that might have led to very considerable question ; but he was precluded from considering that, because it was stated, as a fact,

* 328 that the board of directors never had consented, * and that the consent had been obtained in an irregular way. That, however, is not so here. The way therefore in which I propose to put it to your Lordships, in point of law, is this ; the question is, not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law, but the question simply is, whether by that continued course of dealing the directors have not bound themselves to such an extent that they cannot be heard in a Court of justice to set up, with a view to defeat the rights of parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have

always neglected to do. I have only slightly referred to the cases, but I am not aware of a single authority which impugns the doctrine that they are bound by their own acts. The cases seem to me quite on all fours with the present, and to lay down the general principle which I have enunciated. I wish only to guard myself against being considered to hold that where, as in Morgan's case, the directors of a company do an act which is clearly not within their power, and to which they never could by any form, or any ceremony, give vitality, such an act can be maintained. That is a question which in every case must stand upon its own merits, and it has no bearing upon the case now before your Lordships, which is one where the directors could, if they had thought proper to perform their duty, have given validity to every one of these transfers. They chose to neglect a portion of the proper forms and ceremonies, looking at the substance, which they never did lose sight of, but they entirely disregarded the form, and they have thus given interests to parties which these parties never could have had without their consent.

I beg your Lordships for a moment to consider the effect in this particular case. In consequence of the certificate having been given by the directors, the transfer having been * made * 329 by Mr. Shortridge, and the register having been published according to the Act of Parliament, with the name of the new purchaser as a new shareholder, and with the name of Mr. Shortridge excluded, as a person who no longer remained a shareholder, the matter stands upon the books as a real transaction just as it stood before the public. Mr. Shortridge is no longer a shareholder; but Mr. Somebody else is a shareholder in his stead. What is the effect of that? In the first place, Mr. Shortridge says very truly: "If instead of giving your consent in a regular manner you had dissented, I should have made you purchase, as you were compellable to do, for it was not a matter of choice; and in what situation would you then have been placed? I should have been relieved, and you would have been the purchasers of those shares; to me it is utterly indifferent who possesses the shares, because I must have had a price according to the day, and I should have been relieved from any further concern in the matter." The directors, by this informality, attempt to relieve themselves from any obligation for the future to purchase these shares (for it is to be observed, that the obligation to purchase never can arise in the

way in which they endeavour now to dispose of the rights of Mr. Shortridge), and having relieved themselves as purchasers and shareholders in the concern, liable to all the debts and obligations of the company, at a subsequent period they say that there has been informality in the form, and they tell you that the person to whom Mr. Shortridge sold the shares is not a purchaser, is not a shareholder in the concern, although according to their register kept under the Act of Parliament he is a shareholder, and although they have treated him in every respect as a shareholder. They

have sent him regular notices of their meetings; he has attended their meetings; * he receives the dividends which they pay to him. They make calls, and those calls are not only made upon him regularly, but they actually write letters to him to enforce those calls; and as regards Mr. Shortridge, whom they have proclaimed to the world under the Act of Parliament as no longer a member of the company, they do not send him any circulars; they do not call him to any meeting; and if he had gone to a meeting, they would have turned him out, and said, "You are no longer a shareholder; you are not upon our register." Suddenly, however, the whole of these transactions are to be swept away, and the parties are to be restored, not to their original situation at the time of transfer, when one party wished to cease to be a shareholder, and the other wished to become a shareholder. See in what a different situation they would stand now. The company has been damaged in such a way that the parties never can be replaced in the situation in which they stood before. All this proves the great injury which would be inflicted upon parties who should enter into a company, if the company might with perfect impunity disregard its own forms and ceremonies, admit parties to a partnership, permit them to leave it, and admit other parties to come in as partners in their place, and then take advantage of a slip in point of form, and annul the whole of the transaction. Fortunately, as it appears to me, that cannot be done in this case. I deeply regret that my noble and learned friend does not take the same view that I do of this case; but I have a very strong impression upon it, and therefore I cannot hesitate in advising your Lordships to affirm this decree.

Decree affirmed.

Lords' Journals, 1 May, 1855.

* EASTERN COUNTIES RAILWAY CO. v. HAWKES. * 331

1855, June 14, 15, 21, 22; July 11.

The DIRECTORS, &c. of the EASTERN COUNTIES	}	<i>Appellants.</i>
RAILWAY COMPANY,		
HENRY HAWKES,		<i>Respondent.</i> ¹

Railway. Specific Performance. Defective Title.

Where an Act creating a railway company, or giving new powers to an existing company, authorises the purchase of lands for extraordinary purposes, a person who agrees to sell his land to the company is not bound to see that it is strictly required for such purposes: if he does not know of any intention to misapply the funds of the company, but acts *bonâ fide* in the matter, he may enforce performance of the contract.

Promoters of a company proposing to make a line of railway, or persons standing in a similar situation, as directors of an existing company applying to Parliament for authority to make a new line, may lawfully enter into a contract for land that will be necessary for the purposed line should the bill pass, and when it has passed, such contract will be valid, and may be enforced. The mere want of legal power to make the contract at the moment of entering into it, will not affect its validity afterwards. *Secus* where the Act is itself illegal, and Parliament is to be asked to legalize it.

Where a contract for the purchase of land is made by the projectors of a proposed line of railway, though an action at law may be maintained upon the contract, a Court of equity will not, simply on that account, refuse its interference to compel specific performance.

In a contract for the sale of land for the purposes of a projected railway, the vendor was described as having, so far as regarded one part of the land, no more than a mere life estate, and the projectors of the railway undertook to obtain from Parliament powers to enable him to make a good title: —

Held, that where they did not fulfil this stipulation, or but for their own default the title might have been perfected, they could not set up his deficiency of title as an answer to a bill for specific performance.

But (per Lord Campbell) though an individual vendee may consent to accept a defective title, it is doubtful whether the directors of a railway company, acting on behalf of the proprietors, can do so.

Semle, that where the directors of a railway company, wanting part of a property, purchase more of it than is required, though that may become a question between them and the shareholders, they cannot on that account avoid the contract with the seller.

* THIS was an appeal brought by the directors of the * 332
Eastern Counties Railway Company against a degree pro-

¹ Galloway v. Mayor of London, Law Rep. 1 H. L. 42.

nounced in favour of the respondent in a suit which he had instituted under the following circumstances. The Eastern Counties Railway Company had been incorporated by an Act 6 & 7 Wm. 4, c. 106, for the purpose of making a line of railway from London to Norwich. In the year 1847 the directors of that company applied to Parliament for the purpose of obtaining powers to construct a branch railway from Wisbeach to join the Great Northern Railway at Spalding. This projected line was called throughout the proceedings the "curvilinear diverging line." Plans and sections of this proposed line were deposited in the usual manner, showing its intended course. It appeared from these plans, and from the limits of deviation marked on them, that the line would pass very near the respondent's property, of which the appellants proposed to take a considerable portion, including a part of his mansion-house and conservatories. The respondent presented a petition in opposition to the bill. The appellants, in order to induce him to withdraw his opposition, entered into an agreement with him, sealed with the seal of the company, by which they agreed to purchase his premises for 8000*l.*, to be paid within eighteen months after the bill should pass, and to pay him a further sum of 5000*l.* as a compensation for his compulsory eviction from his property, and all the costs of making out a title. The agreement recited that the respondent was only tenant for life of part of the property, and the appellants undertook to obtain all necessary powers to enable him to make out a good title to that which they agreed to purchase; and it further stipulated, that in the event of the proposed railway being made in such a manner as to form a junction with the Ambergate, Nottingham, and

* 333 Boston Railway at * Spalding (which proposed line was called the "direct diverging line"), the appellants would make certain sidings for the accommodation of the respondent's mill, the approaches to which would otherwise be interrupted. The respondent, in consideration of this agreement, withdrew his opposition to the bill, which in July, 1847, passed the Legislature (10 & 11 Vict. c. 235). In its provisions the Railway Clauses Consolidation Act and the Lands Clauses Consolidation Act were expressly included, and the appellants were empowered to purchase land, not exceeding thirty acres, for extraordinary purposes. The powers for the compulsory purchase of land were limited to three years from the time of passing the Act; and it was provided,

that in case the railway thereby authorised should not be completed within five years from the passing of the Act, the powers of the company should cease. The appellants were authorised to raise, by the creation of new shares, 250,000*l.* for these purposes, and these new shares were to be considered part of the general capital of the Eastern Counties Railway Company. The Act, however, expressly prohibited the making of the branch line (the "direct diverging line") proposed, for the purpose of joining the Spalding branch of the Ambergate line. In March, 1848, the respondent delivered his abstracts of title, and in the autumn of that year he quitted his mansion at Spalding, gave due notice thereof to the company, and removed to Upton Hall, in the county of Nottingham. In November, 1848, the solicitor to the company wrote to say that the appellants thought of abandoning the Wisbeach and Spalding Railway, and proposed that the respondent should keep his property and receive compensation. The respondent insisted on the completion of the contract, and after much correspondence (in the course of which it appeared that the refusal of * powers to make the direct diverging line led to the * 334 abandonment of the whole scheme), he, on the 4th of June, 1849, filed his bill in the Court of Chancery, in which he set forth the facts above stated, and prayed for a decree for specific performance.

The appellants put in an answer, in which they alleged that their object in treating with the respondent for the purchase of the property was, that they might be enabled to construct a line called "a direct diverging line," which line had not been sanctioned by their Act; that the property was not required by them for the line which had been sanctioned, and that consequently their agreement to purchase was invalid; that the bill as described in the agreement did not pass; that the respondent had no power to sell, and the appellants were incapable of purchasing and holding the messuage and land in question; that he was unable to make a good title to it; that they had no funds applicable to the purchase of it; that the two sums of 8000*l.* and 5000*l.* were exorbitant, and were beyond the value of the property, and exceeded fair compensation for personal inconvenience.

A replication was filed, and evidence entered into on both sides.

The cause came on for hearing before Vice-Chancellor Knight

Bruce on the 13th March, 1850, when his Honour was pleased to order that the contract should be specifically performed, and referred it to the Master to make the usual inquiries as to value, and in doing so to have regard to the contract, and to the clause therein relating to the respondent being only tenant for life, and to the provisions of "The Lands Clauses Consolidation Act, 1845," and further directions were reserved. The Master made his report

on the 26th June, 1850, and certified that a good title * 335 could be made by the respondent, and that such * good title was first shown on the 4th May, 1850. The appellants took nine exceptions to this report, of which the 6th and 7th were alone material. They were in the following terms:—

"For that the plaintiff, Henry Hawkes, claiming to be only tenant for life of the greater part of the property, is not empowered to sell and convey, and the company is not empowered to purchase and take, such part of the property as is not shown upon the deposited plan of the railway, nor described in the book of reference to such plan, the special Act, and 'the Lands Clauses Consolidation Act,' not being applicable to land which is not so shown and described, and the whole property being comprised in one contract; the same cannot, therefore, be performed."

"For that the powers of the company to purchase and take land are not, and have never been, in force, inasmuch as the capital proposed to be raised by the Wisbeach and Spalding Special Act has not been subscribed for."

The Vice-Chancellor overruled the exceptions,¹ and the case was then taken by appeal before Lord Chancellor St. Leonards, who, on the 15th November, 1852, affirmed the decree of the Court below.² The present appeal was then brought.

The Solicitor-General (Sir R. Bethell) and Mr. Malins (Mr. Grove was with them) for the appellants.—The decree is bad, for it directs the appellants to do that which is illegal. The contract which they are called upon specifically to perform is *ultra vires*; the land is not wanted for the purposes of the railway authorised by the Act, nor can the contract be enforced as a contract for land for extraordinary purposes, for there are no such purposes for which it is required, and the quantity they are * 336 directed to * take is more than could be so required. The

¹ 3 De G. & S. 743.

² 1 De G., M. & G. 737.

appellants have no capital to apply to the purposes of this line ; their powers under the special Act have expired, and they cannot lawfully make a payment to the respondent out of capital which has been raised for other purposes, and which can be lawfully applied to those other purposes alone. If a chartered or incorporated company is applying to Parliament for an authority to enter on a new undertaking, the directors cannot be permitted to take the original capital, and employ it to answer the costs and expenses of the new intended undertaking ; much less are they at liberty to apply one fourth of their original capital to the construction of new works not authorised by the original Act ; and this restriction applies to the profits derived from the original undertaking, as well as to the capital primarily raised for it. The appellants rely much upon this point. The first case applicable to it is that of *Colman v. The Eastern Counties Railway Company*,¹ where it was held that the directors of one railway company could not appropriate any part of the funds of that company to assist in the projects of another company, though the success of the latter might materially contribute to that of the former. That was followed by *Bagshaw v. The Eastern Union Company*,² where a company was authorised to make a branch line, and had power to call up additional capital, with a direction in the new Act that such additional capital should form part of the general capital of the company ; but the Court held, that the capital thus specially created, and enabled to be added to the other, must be considered as dedicated to the special purpose for which it was raised, and could not be appropriated to any other. These two cases exhaust the circumstances under which such a question * can arise, although there are several others * 337 where the same principle has been applied. In *Salomons v.*

Laing,³ the directors of one railway company desired to take for their own company shares in another, which was a feeder to their original line ; but the Master of the Rolls would not permit such a proceeding, and said expressly :⁴ “ A railway company, incorporated by Act of Parliament, is bound to apply all the monies and property of the company for the purposes directed and provided for by the Act, and for no other purpose whatever.” *The*

¹ 4 Railw. Cas. 513, 10 Beav. 1.

² 7 Hare, 114, 6 Railw. Cas. 152, affirmed 2 Macn. & G. 389.

³ 12 Beav. 389.

⁴ 12 Beav. 352.

*Great Western Railway Company v. Rushout*¹ is to the same effect. Such has been the doctrine as laid down in Courts of equity: it has been declared with equal clearness in Courts of common law. In the *East Anglian v. The Eastern Counties Railway Company*,² the general principle was laid down, that a railway company, incorporated by Act of Parliament, cannot, even with the assent of all the shareholders, enter into a contract involving the application of a portion of the funds to purposes foreign to those for which it was incorporated. In *Gage v. The Neumarket Railway Company*,³ and in *Gooday v. The Colchester Railway Company*,⁴ contracts of the sort here entered into were refused to be enforced. The public have an interest in the proper administration of the powers conferred by such an Act. In *Macgregor v. The Deal and Dover Railway Company*,⁵ the same doctrine as to an agreement not warranted by the Legislature, was even more forcibly expressed, and it was said: "It is a promise that an act shall be done

contrary to the public law of the country, of which both * 338 parties are bound to take * notice; the act is therefore illegal, and the promise that it shall be done is a void promise." That principle was strictly applied in the case of the *Mayor of Norwich v. The Norfolk Railway Company*,⁶ where Lord Campbell made some very strong observations on the attempt to enforce agreements in themselves illegal. All these cases show the jealousy with which the Courts have guarded against any dealings by which powers conferred under Acts of Parliament might be applied to purposes not warranted by the clear provisions of the Acts themselves. Here it is admitted that when this agreement was made, the appellants had no capital, nor any funds, but what were possessed under the original Act, nor at the time of the decree made any power to raise capital; and yet they have been directed to perform an agreement, and to pay money; neither of which things can they do, except in disregard of the original purposes of the Act, and in defiance of their want of lawful power to act in the manner directed.

[LORD CAMPBELL. — Was the contract legal or illegal at the moment it was entered into? If it was legal, nothing happening afterwards can affect it.] It was an agreement to take a piece of

¹ 5 De G. & S. 290.

² 17 Beav. 132.

³ 11 C. B. 775.

⁴ 22 Law J., N. S., Q. B. 69, 18 Q. B. 618.

⁵ 18 Q. B. 457.

⁶ 4 Ellis & B. 397.

land which was at that time wanted for the purposes of the company, and was not delineated on the Parliamentary plan ; it was, therefore, in point of law, no contract at all. An individual cannot enforce a contract which the company had no authority to make.

[LORD CAMPBELL. — If the contract is *ultra vires* with the knowledge of the party making it, he cannot afterwards enforce it ; but if he has no such knowledge, it would be binding in his favour.] It is submitted that the principle of the cases now referred to does not warrant that distinction.

This contract was *ultra vires*. It was not necessary for the company to take the whole of the respondent's land, * and the agreement to take a part was not accompanied * 339 by any obligation to take more than was absolutely necessary. It was said in the Court below that the company had power to take thirty acres of land for extraordinary purposes, and that was put as a justification for this contract ; but no such justification existed, for the land here agreed for was not wanted for extraordinary purposes. [LORD CAMPBELL. — Is the vendor bound to inquire whether the land is wanted for extraordinary purposes or not ?] He is. The 8 & 9 Vict. c. 18, § 12, merely authorises persons to sell land for extraordinary purposes, and the 8 & 9 Vict. c. 20, § 45, restricts the number of acres which can be sold for such purposes. It is clearly, therefore, the duty of the vendor of land to inquire for what purposes his land is wanted, and to see that the provisions of the statute are complied with. This contract was made independently of the power thus conferred, and is therefore bad. In the case of an agreement like this, which is one of doubtful legality, the rule of Courts of equity is not to enforce it, but to give the party the opportunity to try its validity at law. *The Shrewsbury and Birmingham v. The Northwestern Railway Company*.¹

The next point relates to the power of promoters (which, as to this branch railway, these appellants must be construed to be) to bind the future company, by entering into a contract previous to incorporation. The judgment in the Court below referred to *Edwards's Case*,² and *Stanley's Case*,³ and *Lord Petre's Case*,⁴ and

¹ 3 Macn. & G. 70.

³ 3 Mylne & C. 773, 1 Railw. Cas. 58.

² 1 Mylne & C. 650, 1 Railw. Cas. 173.

⁴ 1 Railw. Cas. 462.

the observations made on them amount to saying that the promoters may enter into a larger contract than can be entered into by the company when incorporated, which is the same as saying * 340 ing *that a man's agent can bind him to a greater extent than he can bind himself. That doctrine is not warranted by these cases. In all of them, but especially in those of Edwards and of Lord Petre, the principle adopted was to try the contract by the provisions of the Act constituting the company, and if it was within those provisions, but not otherwise, to hold it good. The case of *Simpson v. Lord Howden*¹ decided a point which does not apply to this case.

[THE LORD CHANCELLOR. — In the case of Lord Petre, the contract was nominally to buy the owner's land, but the terms of purchase were excessive, and were made so as a consideration to buy off opposition. If your argument is strictly applied, that case cannot stand.]

There certainly was but one opinion about that decision: it went at least to the very verge of the law.

Then as to the title to this property. The decree has declared that the appellants are to pay the whole sum of money claimed by the respondent, and that he is to convey the land. This decree cannot be supported, except both parts are complied with, and unless the respondent can convey to the appellants the fee simple. But he has only a life estate as to part, at least, of the property. They may therefore be liable to ejectment by the remainder-man. This objection was pressed on the Court below, but it was answered by reference to the 7th section of 8 & 9 Vict. c. 18, which enables certain parties, under disability, to sell and convey lands. But such conveyance can only be made subject to the conditions of the 9th section, and this decree makes no provision for carrying into effect those conditions, and consequently the appellants would have no ground on which to rest a defence to an ejectment. In

the cases of *Webb v. The Direct London and Portsmouth* * 341 * *Railway Company*,² and of *Stuart v. The London and Northwestern Company*,³ there was no doubt about the sufficiency of the title of the plaintiff, and that is the only real difference between those cases, as decided by the Lords Justices, and the present, and that difference makes them all the more

¹ 9 Clark & F. 61.

² 1 De G., M. & G. 721.

³ 9 Hare, 129, 1 De G., M. & G. 521.

unfavourable for this respondent. They are distinctly applicable here.

[LORD CAMPBELL. — Is it not your own fault if the remainderman can bring ejectment against you after Hawkes's death?]

[LORD ST. LEONARDS. — And is it not your fault that nothing was done by the Court to make your title perfect? The option was offered you in the Court below.]

What was so offered, admitted the nullity of one part of the decree. A contract of this kind can only be carried into effect by authority of Parliament, not by the mere assistance of the Court; and such, in substance, is the opinion of Lord Cottenham, in the *Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*.¹ But this case is even stronger than that; for here the line is abandoned, and the time within which any thing could be legally done has now expired.

Lastly, this is not a fit subject for a decree for specific performance, according to the doctrines of a Court of equity. If the contract is invalid, it cannot be enforced; if it is valid, the respondent must be left to his remedy at law. *Gooday v. The Colchester Railway Company*.² It is now impossible to carry into effect the purposes for which this contract was made. In such a case, the general rule that will govern the application of the powers of a Court of equity is laid down in *Harnett v. Yielding*.³ Lord * Redesdale there said, that the "original foundation for * 342 these decrees for specific performance was simply this, that damages at common law would not give the party the compensation to which he was entitled"; and he added, that where damages could be commensurate with injury, the Court had refused to interfere. That is the case here; and, as in the cases of Webb and of Stuart, the parties ought to be left to their remedy at law.

Sir F. Kelly and *Mr. B. S. Follett* (*Mr. Loftus Wigram* was with them) for the respondent. — There is no necessity to appeal to authorities in this case. The true position of the parties being explained, the principles of equity applicable to it are plain and undoubted. Here opposition was threatened to a projected company; if that company was to come into existence, and to do the work it proposed, the land of the plaintiff was necessary for it.

¹ 2 Phillips, 597 — 604.

² 2 Sch. & L. 549 — 553.

³ 17 Beav. 132.

The purchase of that land was therefore within the powers of the promoters, as its use would be within the purposes of the intended Act. The contract was made ; it was conditional on the Act being passed ; but if the Act passed, the appellants would have power to destroy the respondent's residence ; that residence therefore was purchased. The respondent could not convey a complete title to all his land, and the appellants were aware of that fact, and undertook to get clauses inserted to supply the deficiency. The respondent *bonâ fide* performed all that he had stipulated to perform. The appellants were bound to do the same. The purchase being lawfully made, the funds of the company were lawfully applicable to it, as they would be to the purchase of rails, which, though not wanted at the moment, were purchased because they were at a very low price, and it was fairly believed that before the time when they would be required they would rise in value.

*343 If the funds in hand were insufficient, the appellants had authority, under the fourth section of their Act, to raise further funds. The making of this line was, in truth, part of the general purposes of the company, and consequently *Bagshaw's Case*,¹ *The East Anglian Company v. The Eastern Counties Company*,² *Macgregor v. The Deal and Dover Railway Company*,³ *Salomons v. Laing*,⁴ and all that class of cases, are inapplicable here ; nor is that of *Gage v. The Newmarket Railway Company*⁵ in point, for there the contract was construed to be conditional, and the condition was held not to have attached.

The argument that this decree will compel the appellants to do that which is in violation of the Act of Parliament, assumes that the agreement here is not lawful and binding ; but it is contended to be so ; there is mutuality in it ; and if the respondent had not performed his part of it, the appellants might have maintained a bill against him for a specific performance. In that respect it is unlike the case of *The Shrewsbury and Birmingham v. The London and Northwestern Railway Company*,⁶ where it is true that the Lords Justices would not support the agreement, but on which Lord Justice Knight Bruce expressly took occasion to say, that neither in

¹ 7 Hare, 114, 6 Railw. Cas. 152, 2 Macn. & G. 389.

² 11 C. B. 775.

³ 22 Law J. Q. B. 69, 7 Railw. Cas. 227, 18 Q. B. 618.

⁴ 12 Beav. 339.

⁵ 18 Q. B. 457.

⁶ 4 De G., M. & G. 115, 7 Railw. Cas. 531.

the case of Webb,¹ nor in that of Stuart,² had he intended in the slightest degree to depart from what he had laid down in the present case,³ when it was before him for decision. A landowner has a right to oppose a bill; he may consent to withdraw his opposition; and that is a good consideration for a contract of this kind. Such a contract is binding upon a company * incor- * 344 porated by the Act, even if the company should then be constituted of persons different from the original promoters.

[LORD CAMPBELL. — Without their having adopted it?]

They adopt it, and take the benefit of it by their act; and the principle on which Lord Cottenham decided the case of *The Great Western v. The Birmingham and Oxford Junction Railway Company*⁴ is that which must govern this case, namely, that that which has been done by promoters, being necessary for the purpose of this company, must afterwards be upheld as binding on the company.

The fact that the powers of the Act have now expired is no answer to this bill; they were in full force when the bill was filed, and for nearly a year and a half afterwards.

The want of a title in the respondent to more than a life interest in the property, is no answer to this bill. The appellants knew what his title was, and undertook to obtain powers to enable him to make a complete conveyance; they did not obtain those powers; that was their fault, and they cannot take advantage of it. The provisions of the Lands Clauses Act would have sufficed for enabling the Court to do all that was necessary to protect the interests of the appellants, and the Court below offered to exercise those powers for that purpose. It was the fault of the appellants that they did not avail themselves of that offer. Whatever defect now exists as to that matter is therefore owing to the appellants; and they cannot set up their own default as an answer to a claim for the performance of this agreement.

The respondent can maintain this bill for a specific performance. The principles of equity applicable to this subject may be taken from the judgment of Lord Justice Cranworth, in *Webb v. The Direct Portsmouth * Railway Company*.⁵ Under cir- * 345 cumstances such as exist here, a party to an agreement is

¹ 1 De G., M. & G. 521.

² 2 Phill. 597, 604.

³ 1 De G., M. & G. 721.

⁴ 1 De G., M. & G. 521 – 528.

⁵ 3 De G. & S. 743.

not bound to run the risk of what a jury may happen to consider sufficient damages for losing his land, and being forced to seek another residence. *Gooday v. The Colchester Railway Company*¹ does not impeach the principles stated in Webb's and Stuart's cases; for there the question was, whether the contract itself had been validly created; and the Court, not thinking it to be a valid contract, would not enforce it. Here it is perfectly valid.

July 11.

THE LORD CHANCELLOR, after fully stating the facts, the pleadings, and the decree of the Court below, said. — The first point insisted on by the appellants is, that the contract was one into which they had no power to enter, having been made for an object not within the scope of their original constitution. That object was the purchase of land for the purposes, not of the original line, but of a new line, which new line at the date of the contract they had no authority to make. In support of this argument, reliance was placed on a long series of authorities, which have established the proposition that a railway company cannot devote any part of its funds to an object not within the scope of its original constitution, how beneficial soever that object might seem likely to prove.

Thus, in *Colman v. The Eastern Counties Railway Company*,² Lord Langdale, at the instance of a shareholder, restrained the company and its directors from applying any part of their funds in assisting a company which had been formed for establishing a steam communication * between Harwich and the northern ports of Europe. The directors of the railway company thought that such an application of a part of their funds would be likely materially to promote the interests of their shareholders by encouraging and increasing the traffic on their line. But Lord Langdale, though admitting that such an expenditure might very likely conduce to the interest of the railway company, yet restrained the directors by injunction from so applying any part of their funds, on the ground that they had no right to expend the money of the company on any project not directly within the terms of its incorporation.

In *Salomons v. Laing*³ the same learned Judge restrained the directors of The South Coast Railway Company from applying any

¹ 17 Beav. 132.

² 12 Beav. 339.

³ 10 Beav. 1, 4 Railw. Cas. 513.

part of the funds of that company in the purchase of shares of another company (the Portsmouth), by which purchase the defendants hoped to benefit the company of which they were directors. The Court held that the defendants had no right to deal with the funds in a manner not authorised by their Act.

The same principle was recognised and acted upon by Sir James Wigram and Lord Cottenham in *Bagshaw v. The Eastern Union Railway Company*.¹ There the Legislature had authorised the defendants to raise, by way of additional shares, two sums of 200,000*l.* and 100,000*l.*, the former for the purpose of enabling them to construct a branch line to Harwich, and the latter for enabling them to purchase and complete a cross line to Hadleigh. The plaintiff had purchased scrip certificates for shares in these undertakings, or one of them, on which all calls had been paid, and he stated by his bill, that the directors, though the whole of the two sums of 200,000*l.* and 100,000*l.* had been raised, yet had abandoned the intention of constructing * the Harwich line, * 347 and were about to apply the sums so raised to the completing of their line from Ipswich to Norwich. The bill prayed, amongst other things, a general account of all sums so applied, that the directors might be decreed personally to make them good, and for an injunction to restrain any further similar application of any part of the said two sums of 200,000*l.* and 100,000*l.* To this bill there was a general demurrer, but it was overruled, first by Sir James Wigram, and afterwards, on appeal, by Lord Cottenham; the ground of the decision there, as in the other cases, being that the directors had no right to expend any part of the sums raised for a special purpose upon any other object than that for which they were so raised.

In all these cases the discussion was raised by shareholders calling in question the misapplication or intended misapplication of the corporate funds by the directors. But the doctrine has been acted on in the Courts of common law to the extent of holding that a contract, even under the seal of a company, cannot in general be enforced, if its object is to cause the corporate property to be diverted to purposes not within the scope of the Act of incorporation. Thus, in the case of *The East Anglian Railway Company v. The Eastern Counties Railway Company*,² the Court of Common Pleas, after an elaborate argument, held that no action

¹ 6 Railw. Cas. 152.

² 11 C. B. 803.

could be maintained against the defendants on a covenant into which they had entered for payment to the plaintiffs of the costs incurred in applications to Parliament made at the instance of the defendants for obtaining from the Legislature powers which the defendants considered it desirable for their interests that the plaintiffs should possess. The Chief Justice, in delivering the judgment of the Court, says:¹ "The statute incorporating * 348 * the defendants' company gives no authority respecting the bills in Parliament promoted by the plaintiffs, and we are, therefore, bound to say that any contract relating to such bills is not justified by the Act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void.

This case was afterwards recognised and acted on by the Exchequer Chamber, in the case of *Macgregor v. The Official Manager of the Deal and Dover Railway Company*.² It must, therefore, be now considered as a well-settled doctrine that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorised by the terms of its incorporation, however desirable such an application may appear to be.

I have referred to these cases, and there are others to the same effect, for the purpose of showing how firmly the law on this subject is established, and of guarding myself against being supposed to throw any doubt upon it. But I do not think that the present case comes within the principle on which these decisions have rested. The making of the Wisbeach and Spalding branch was not treated by the Legislature as a new and independent object to be carried into execution by distinct funds raised for that special purpose. The power to make the new line was, according to the construction I put on the Act, merely an addition to the powers conferred by the former Acts. So that after the Wisbeach and Spalding Act came into operation, the rights and powers of the company were to be regarded as if they had originally been powers to make the new line and to raise the additional capital. The new works were to be considered as having formed part of the original undertaking, and the new shares were to be * 349 * considered as part of the general capital. From the time, therefore, when the Wisbeach and Spalding bill received

¹ 11 C. B. 809.

² 22 Law J., N. S., Q. B. 69, 18 Q. B. 618.

the Royal assent (and until that happened there was no binding contract) the directors had just the same right to apply their funds to the purchase of land for the purposes of the new line, as, before the passing of that Act, they had for the purchasing of land for the original line. This consideration, therefore, seems to me clearly to distinguish the present case from all those cases cited in the argument. The contract here was to apply the funds of the company to a purchase within the scope of its incorporation, and not to any purposes foreign to it, and I see no objection, therefore, to the contract on this first ground.

But it was argued, secondly, that even supposing the contract not to be open to objection on the ground of its being an attempt to appropriate the company's funds to an object foreign to their original purposes, still that it could not be supported, inasmuch as it was an agreement to purchase for the new railway lands not wanted for the purpose of making it. The directors had originally desired to obtain powers to make a straight cut from their new line to join the Ambergate, Nottingham, and Boston Railway, and for that purpose it would have been essential to them to possess the plaintiff's land, but they failed in their object of obtaining power to form this straight cut, and then there was not, it was said, any necessity for them to get possession of the plaintiff's land. A small portion only of it, about an acre and a half, is within the line of deviation, and it was argued that a contract to purchase the whole (nearly six acres) was a contract *ultra vires*, inasmuch as the company could only purchase what was really necessary or proper for the construction of the line. But the answer to this argument appeared to me satisfactory. The contract was not necessarily, and on the face of it, *ultra* * *vires*. If the land in question was really wanted by the *350 appellants for what are called extraordinary purposes, they were authorised to purchase it. Besides, the line of deviation actually cuts the respondent's house in two, and in such circumstances the appellants had no right to take a part without taking the whole, if the plaintiff required them to do so; and it is a reasonable inference that the contract to purchase the whole was made, because, wanting what was within the limits of deviation, the directors knew that they could not stop short with what was within those limits. Be that, however, as it may, there was nothing to show the respondent that his land was not wanted for the

legitimate objects of the company, and in such a case it cannot be permitted to the directors to allege that the contract was invalid as being beyond their powers ; for, as argued at the bar, it could be no answer to an action for iron rails bargained and sold that the contract had been entered into, not in order to obtain rails for the use of the line, but in order to keep them in hand for the purpose of a future use, on a speculation that iron was likely to rise in value. I consider, therefore, that this second objection is as untenable as the first.

The third point made in support of this appeal was, that even taking the contract to have been a good and valid contract, into which the company might lawfully enter, still the case was one in which a Court of equity ought not to interfere, but ought to leave the plaintiff to assert his legal rights by action. It was argued that the Court has frequently acted on this principle in suits where a vendor has been seeking, as in this case, to enforce against a railway company the specific performance of a contract for the purchase of land, when the time within which the line was to be made had expired. And reference was in particular made to * 351 two cases decided by Lord Justice * Knight Bruce and myself, when I held the office of Lord Justice. I allude to the cases of *Webb v. The Direct London and Portsmouth Railway Company*,¹ and *Stuart v. The London and Northwestern Railway Company*.²

In the former of these cases [the particulars of which his Lordship fully stated] the Court proceeded on two grounds. In the first place the terms in which the deed was framed were such as to lead the Court strongly to the conclusion that the whole contract was meant to be conditional on the line being formed, and that if it should be (as in fact it was) abandoned by its projectors, then all the provisions of the agreement were to fall to the ground ; a construction, I may observe, which receives great support from the subsequent case of *Gage v. The Newmarket Railway Company*.³ But independently of that difficulty, the case appeared to be one in which a Court of equity ought not to interfere in favour of the plaintiff, for that by any such interference we should be doing injustice in the attempt to add to the legal remedy. The injury which the plaintiff sustained by the non-performance of the

¹ 1 De G., M. & G. 521.

² 18 Q. B. 457.

³ 1 De G., M. & G. 721.

contract was this: though he was left with the whole of his land untouched, he lost all claim to the 4500 $\frac{1}{2}$., and might, perhaps, have sustained damage consequent on his having been for five years liable to have any portion of it, not exceeding eight acres, taken by the company for the purpose of the railway. That was evidently a case for compensation by action for damages, and not for relief by way of specific performance. Indeed, I hardly know how a decree for specific performance could have been there enforced, for no particular eight acres had been contracted for, and the * company had no power to select eight acres, ex- * 352 cept for the purpose of making the railway, the power to make which had long since ceased. On these grounds the Court refused to interfere, leaving the plaintiff to the legal remedy on his covenant.

The circumstances of *Lord James Stuart's Case* were similar in principle. [His Lordship fully stated them.] The only or principal difference between this latter case and that previously decided was, that in *Lord James Stuart's Case* there was no contract by the company under seal, but in the course of the argument the directors offered to remove all difficulty on that head by admitting, in any action which the plaintiff might bring against them, that they had by deed, under seal, covenanted to perform any contracts entered into by the agent of the projectors before the passing of the Act. Whether, if the directors had not agreed to make this admission, they would have been compelled to do so, I need not now stop to inquire. We were relieved from all difficulty on that head by their voluntary offer to make the requisite admissions, and what we had to decide was, whether an action brought with such admissions would not give the plaintiff all the redress he was entitled to ask. We thought it would, and that to permit the plaintiff to remain passive till the directors could not have any use for the land, and the power to make the line had expired, and then to compel them to select and purchase the land, would be to make the extraordinary interposition of the Court ancillary to injustice instead of justice.

I have thought it necessary to explain the grounds on which the decision in these two cases rested, for the purpose of showing that they are not at variance with the decision now under appeal. Here there is no uncertainty as to the subject matter of the purchase. The vendor * did not sleep on his rights, and wait * 353

until it was impossible for the purchaser to make the line. On the contrary, from the very day on which the contract was to be completed he insisted on its performance, having shortly before that time quitted possession of the property, and within less than five months afterwards he filed his bill. It is true that the directors, after the filing of the bill, allowed the time to pass within which they were bound to complete their line. But the plaintiff is not to blame for that. He did not, either actively or passively, mislead the defendants, and it would be impossible to hold that he is not entitled to the relief he asks, without going the length of saying that no vendor of an estate, contracting to sell to a railway company, can ever have a decree for a specific performance if the company should see fit afterwards to abandon the undertaking, with a view to which the contract was made.

The fourth and last objection made to the decree below was, that as to a very large portion of the property the plaintiff is only tenant for life, and consequently at his death the company will be exposed to an action of ejectment at the suit of the remainder-man, who is not bound by the plaintiff's contract. To this objection, however, I think it a sufficient answer to say, that at the time fixed for the completion of the contract, and for above a year after the filing of the bill, the plaintiff certainly could make a perfect title by virtue of the provisions of the Lands Clauses Act. It is not necessary for me to give any opinion as to whether he can do so now. It is enough to say, that the appellants, by the contract itself, undertook expressly to procure all proper powers for enabling the plaintiff (though a mere tenant for life), and all other necessary parties, to make a good title. Such powers were in

* 354 fact obtained. The plaintiff repeatedly offered * to do all that was requisite, in order to enable the company to profit by the use of these powers. If the appellants have wilfully let the opportunity pass, they cannot set up their neglect as a bar to the plaintiff's demand. The decree directed the money to be paid into Court, and it has since been invested on a good mortgage security, approved by the Court, to which no objection is made. They are estopped, as between themselves and the plaintiff, from disputing his title, and if after the death of the plaintiff any question should be raised by the remainder-man, that question must be then discussed and disposed of. It is the fault of the appellants

that the title was not perfected, and they cannot take advantage of their own default. In my opinion the appellants have entirely failed on all their grounds of objection, and I therefore move your Lordships to dismiss the appeal, with costs.

LORD BROUGHAM. — I take the same view with my noble and learned friend upon the four separate points which are raised.

Upon the point with respect to the legality or illegality of this contract, I am clearly of opinion that there was nothing illegal in the agreement as to the proposed railway, and that the directors, therefore, cannot avail themselves of that plea.

I admit that at one time in the course of the argument upon the fourth ground I had considerable doubts. Those doubts have been entirely removed by the consideration to which my noble and learned friend has already directed the attention of your Lordships, that it was entirely owing to the default of the company that that matter, which is the ground of the fourth objection, arose.

I should not trouble you with another word after the very full and distinct statement of the reasons for the * motion to * 355 affirm the judgment which my noble and learned friend has made, were it not that I think it right to advert to two cases, *Webb v. The Direct London and Portsmouth Railway Company*, and *Lord James Stuart v. The London and Northwestern Railway Company*. I am clearly of opinion that if these cases were applicable to such a state of facts as those which exist in the present, I should dissent from them, and consider that they do not give the law of the Court upon the subject of specific performance. But I am of opinion, for the reasons already given, that they do not apply to the facts of this case, which are so entirely different that it cannot be truly said that the appellants' contention against a decree for specific performance can rest upon their authority.

LORD CAMPBELL. — The first question to be considered in this case is, whether there was a valid contract between these parties. I should have answered this question in the negative if the appellants' counsel had succeeded in showing that the contract related to "the direct diverging line," which is not delineated in the Parliamentary plan, and that, with the knowledge of the respondent, the object was to make the line without the authority of Parliament.

There can be no doubt that, as between the directors and the shareholders, it would have been *ultra vires* for the directors to put the seal of the company to such a contract. They could not lawfully apply the funds of the company to the making of this line either under the Act of the 10 & 11 Vict. c. 235, or any of their prior Acts, and the respondent having full notice that they were exceeding their powers, and were guilty of a breach of trust, he could not have enforced the contract either at law or in equity.

But upon the face of the contract itself there is no reference
 • 356 * whatever to the “direct diverging line.” The recitals and the operative parts of the contract refer only to the main line between Wisbeach and Spalding, and to the “curvilinear line” of junction delineated upon the Parliamentary plan; nor is there any evidence to prove that the respondent was a party to the scheme alleged to have been formed by agents of the company to deceive Parliament by abandoning the curvilinear and substituting an unauthorised direct line of junction with the Ambergate Railway.

This objection being removed, and now assuming that the contract was entered into by the respondent *bonâ fide* with a view to the Parliamentary plan, and to an Act being obtained to carry that plan into effect, I cannot doubt for a moment that there was a valid contract, upon which, after the Act of Parliament had been obtained, an action at law might have been supported against the company.

During the argument there was much discussion upon the question how far such a company is bound by contracts entered into by the promoters of the Act of Parliament by which the company is constituted. That question really does not properly arise here; but I think it right to guard myself against the peril of being supposed to acquiesce in the doctrine contended for by the respondent’s counsel, that there is complete identity between the promoters of the Act and the company, and that as soon as the Act has received the Royal assent a bill in equity might be filed against the company for specific performance of any contracts respecting land into which the promoters had entered. If the company should adopt the contract, and have the full benefit of it, I think the company would be bound by it in equity, and therefore I approve of the decision in *Edwards v. Grand Junction Canal Company*,¹ although

¹ 1 Mylne & C. 650, 1 Railw. Cas. 173.

the language of Lord Cottenham in that case may require * qualification, and must be taken with reference to the * 357 facts with which he was dealing. But it seems to me that the extension contended for, of the principle on which that case and several similar cases which have followed it, rest, is quite unreasonable, and would lead to very mischievous consequences.

Here there is a contract admitted to be under the common seal of the company. The appellants make an idle allegation that the seal was affixed without the sanction of a majority of the members of the company, but no fraud is imputed to Mr. Hawkes. The directors have repeatedly recognised the validity of the contract, and in an action at law upon it, under a plea of *non est factum*, they could have had no defence, though if they could allege and prove that Mr. Hawkes was guilty of illegality on entering into it, the action would be barred.

But dismissing the charge that he was bargaining for the application of the funds of the company to a line to be made without the authority of Parliament, the contract is merely the ordinary contract between a company meaning to apply to Parliament for authority to extend a line of railway, and the owners of the land through which the extended line is meant to pass, to be carried into effect if the solicited Act of Parliament be obtained. The shareholders of the company might if they pleased object to their funds being applied to defraying the expense of soliciting the bill, but if they remain quiet it may be fairly inferred that they all approve of the extension; and when the bill to authorise the extension has received the Royal assent no shareholder can any longer complain. According to the manner in which such bills are usually framed, the extended line becomes part of the concern to be managed by the company for the profit of the body of shareholders, power being given to the company to increase the capital, or by some * means to provide the money * 358 necessary to complete the extended line. Since the case of *Simpson v. Lord Howden*,¹ it is impossible to contend that an agreement by a landowner to withdraw opposition to a bill for a railway intended to pass through his property is not a good and valuable consideration. I adhere to the doctrine laid down in a passage quoted from my judgment in the case of *The Mayor of Norwich v. The Norfolk Railway Company*;² but that referred to

¹ 9 Clark & F. 61..

² 4 Ellis & B. 397.

doing something which was positively criminal and indictable, the obstruction of a navigable river by building a bridge across it. This cannot lawfully be done in the hope that an Act of Parliament may be obtained to legalize it. But where no offence is to be committed against the public, and there is a mere want of authority for a transaction among private individuals or commercial companies, which authority can only be obtained by Act of Parliament, no objection whatever can be successfully made to the parties entering into an agreement for completing the transaction when the necessary authority is so obtained.

In this case there was to be no application of the funds of the company to the purchase of Mr. Hawkes's land till an Act should be obtained for making the line from Wisbeach to Spalding, according to the Parliamentary plan. Such an Act having been obtained, an agreement then entered into for the first time, for the purchase of the whole of this land by the company, would have been lawful and binding, and the agreement previously entered into, in anticipation of the Act of Parliament, having been before lawful, then became binding. In considering whether the contract is valid, we must certainly consider whether it was * 359 valid when it was entered into. I think * that this contract was valid when it was entered into, although it was then only conditional.

We have next to consider whether the condition was performed. The appellants contend that it was not, because the Act, when passed, prohibited the direct junction, and did not substitute any other. But the condition in the contract is, "in the event of the said bill in its present, or any amended, modified, or altered form for the like objects, or any or either of them, to which the said Eastern Counties Railway Company shall be parties or promoters, passing into a law." The bill referred to did pass into a law for making the line from Wisbeach to Spalding, and the line of deviation authorised by it comprised a considerable part of Mr. Hawkes's land, and bisected his house.

Therefore, as a common-law Judge, I say with confidence that an action for breach of the covenant to purchase and pay for the land at the stipulated price might have been maintained.

I now come to the remedy by bill in equity for a specific performance. And here I must speak with more hesitation, but I am bound to express my opinion upon it; and this being a branch of

jurisprudence which every English lawyer must study, and having weighed the reasons urged, and referred to all the authorities cited on both sides during the argument, I have come to a conclusion, which is quite satisfactory to my own mind, that the decree for a specific performance, notwithstanding all the objections taken to it, was properly pronounced.

Where there is a valid executory agreement for the sale and purchase of land, there can be no doubt that the vendor as well as the purchaser is *prima facie* entitled to resort to a Court of equity for the purpose of having the contract specifically performed. Generally speaking, pecuniary * damages ade- * 360 quate to the pecuniary loss sustained from the breach of the contract would be an indemnity to the vendor ; but still damages would not place him in the same situation as if the contract had been performed, for in that case he would have entirely got rid of his land, and he would have in his pocket the net sum for which he had agreed to sell it ; whereas if he is driven to his action at law, he retains the land, and he can only recover the difference between the stipulated price and the price which it would probably fetch if resold, together with incidental expenses, and any special damage which he had suffered. In every case justice requires that the purchaser should be entitled to specific performance, for as to him no amount of damage would necessarily be an adequate compensation ; and there must be reciprocity of remedy between vendor and purchaser. Indeed the remedy must necessarily be afforded to the vendor as well as purchaser, from the well-known doctrine of conversion upon the signing of a valid contract for the sale of land, the equitable estate then vesting in the purchaser, and the vendor then holding the legal estate only as his trustee.

This being so, the onus lies upon the appellants to show that the respondent was not entitled to a decree for specific performance.

Here the objection of delay, which has sometimes very properly prevailed, cannot be taken, and it cannot be contended that the vendor has lost his right to the remedy he seeks by doing any thing which he ought not to have done, or by omitting to do any thing which he ought to have done, subsequently to the date of the agreement, with good faith and punctuality. He has performed his part of the agreement ; he has always been ready and willing to complete the purchase, and he has urgently and earnestly pressed the company to complete it. The bill for a specific

* 361 * performance was filed as soon as Mr. Hawkes found that the company had broken the agreement, and within time to have allowed a good title to the whole of the land to be made.

The appellants rely upon difficulties which have arisen from their own delay and their own breach of the agreement. These difficulties are now so serious that I own I should have been glad, for the sake of the innocent shareholders in this company, to find that we should be justified in referring the vendor to his legal remedy, whereby a compensation might be awarded to him for all he has lost from the breach of the agreement, without the embarrassments which must now arise from affirming the decree for a specific performance. But I am of opinion that we cannot revise this decree on any of the grounds on which it has been impeached, without subverting authorities and disregarding principles which we are bound to respect.

Much was said about the hardship which it is alleged the decree imposes upon the company. If, looking to the agreement and the evidence respecting it, we could say that it was a hard or unconscientious bargain, we ought not to enforce the performance of it, and we ought to leave the vendor to his remedy at law. I mean to be guided by the rule laid down upon this subject by Lord Hardwicke in *Buxton v. Lister*,¹ and by the other authorities to the same effect collected in the leading case of *Mortlock v. Buller*.² But reading this agreement, how can we say that the sum of 13,000*l.* was more than Mr. Hawkes might fairly ask for giving up his land and his business? No misrepresentation or

* 362 fraud is imputed to him; the agents * of the company were as competent to form a just opinion upon the subject as he was; no complaint is made of excess of price till the company had abandoned all intention of making the line, and I think that no weight is to be given to the opinion of a surveyor which was afterwards obtained, and which it must have been easy to obtain, that the price was excessive. I see no reason to believe that if the directors had made the line from Wisbeach to Spalding according to the powers conferred upon them, the bargain would have been disadvantageous to the company, and they cannot by abandoning it prejudice the rights of others.

Greater stress was laid upon the objection that the decree orders a misapplication of the funds of the company, but this

¹ 3 Atk. 383.

² 10 Ves. 292.

really resolves itself into the objection to the validity of the agreement, which I have already disposed of. Had the line of railway from Wisbeach to Spalding been made and completed, I am clearly of opinion that the directors might have performed the agreement with Mr. Hawkes, without any misapplication of funds, or any breach of trust whatsoever.

By section 4 of the Act of 10 & 11 Vict. c. 235, they were authorised to raise 250,000*l.* towards making this line, and as this line was to be amalgamated with the railway before made by the company under former Acts, and to form with it one concern, to be managed for the general body of the shareholders, I entertain no doubt that the directors might have employed the funds of the company in the ordinary course of administration for making and maintaining this extended line as if it had been comprised in the original Act by which the company was constituted. The authorities relied upon by the appellant's counsel on this point merely show that the making of *the new line could not *363 be abandoned, in fraud of those who have subscribed to make it, without touching the question, how far, if the new line is made, the funds of the company may be applied to that purpose. When the bill for a specific performance was filed, the power of raising the 250,000*l.* still subsisted, and the directors in their answer say nothing of want of funds or inability to raise money. I therefore do not see how the alleged misapplication of funds can be any reason for a reversal of the decree.

Then comes the most formidable objection, the inability to make a good title to that portion of the land of which Mr. Hawkes is only tenant for life. Had the bill not been filed in time to allow a good title to the whole to be made, I should have thought this objection almost insurmountable. With great deference for what has been observed by my noble and learned friend, who, when Lord Chancellor, affirmed the decree, that the company had agreed to take such title as the vendor had, or to obtain powers for making a good title, I should have doubted much whether, if at the time when the bill was filed a good title could not be made, a specific performance ought to have been decreed.

In a common transaction of sale and purchase of land between individuals, they may certainly bargain that the purchaser shall accept such title as the vendor can make, and the specific performance of such an agreement would be decreed, although the

vendor could not make out a perfect title. But the directors of a railway company have only a limited authority to negotiate for the purchase of land, and I rather think that they would be considered as having exceeded that authority, to the knowledge of the vendor, if they agreed to accept a defective title, thereby
 *364 subjecting the railway company to the risk of being * interrupted by an ejectment from part of the land over which the line runs. I must likewise doubt as to the effect to be given, in a case like this, to a covenant that the company would obtain power by Act of Parliament to make a good title, if no such power had been granted.

But, in truth, this bill for a specific performance having been filed on the 10th of June, 1849, a good title as against the remainder-man might easily have been made to the land of which Mr. Hawkes is only tenant for life. The Act for making the line from Wisbeach to Spalding received the Royal assent on 22d July, 1847, and the compulsory powers conferred by the Act, under which a good title might have been made against the remainder-man, continued in full force till 22d July, 1850. I have already observed that this Act (which embodies in it both the Lands Clauses Consolidation Act, and the Railway Clauses Consolidation Act) authorised the taking of the whole of the land, the subject of the agreement, for the general purposes of making the railway; there seems to me therefore no necessity for resorting to section 14 of the special Act, which authorises the taking of thirty acres for the extraordinary purposes connected with the intended railway.

The decree of Vice-Chancellor Knight Bruce was actually pronounced on the 13th of March, 1850, four months before the compulsory powers had expired. We have now to determine whether that decree was then properly pronounced. Even then the appellants, if so minded, by making the line, and performing their agreement, might have enabled the vendor to make a good title to them of all the land which they had agreed to purchase.

But I am of opinion that whereas, in considering the validity of the agreement, the proper time to regard is the
 *365 * time when it was entered into, — as to the specific performance, regard is to be had to the state of things when the bill was filed. No authority has been cited in support of the position, that the decision upon a bill for a specific performance is to depend upon what has happened between the filing of the

bill and the day when the decree is to be pronounced ; and it would be strange if the plaintiff, being entitled to what he prays for when he files his bill, could be defeated by the chicanery of the defendant in vexatiously resisting the suit.

I have only, further, to make an observation upon what was said at the bar as to a bill being now filed by the directors against Mr. Hawkes for a specific performance. I do not think that such a suit could have been maintained by them from the time when they abandoned the making of the new railway. There certainly must be reciprocity as to the remedies of the two parties, if they respectively act with good faith. But upon the supposition last stated, the directors have not acted with good faith, and they would be seeking to have the land for a purpose different from that for which they had agreed to buy it ; whereas the vendor has always been, since the agreement was entered into, and still is, desirous that it should be in all respects carried into execution. I have not thought it necessary to comment upon the cases cited, although I have examined them all. *Stanley v. The Chester and Birkenhead Railway Company*¹ alone seems to me a sufficient authority for this decree ; and the cases of *Webb v. The Direct Portsmouth Railway Company*,² and *Lord James Stuart v. The London and Northwestern Railway Company*,³ * in * 366 which a decree for a specific performance was refused, are in perfect conformity with the principles which Lord Cottenham there lays down, as the last two cases proceeded upon delay, and the uncertainty of the agreement. For these reasons, I concur with my two noble and learned friends who have preceded me in thinking that the decree appealed against ought to be affirmed.

LORD ST. LEONARDS. — As the arguments at the bar have not removed the opinion which I originally expressed upon the points in this case, and as the appeal is from my decree, I might have considered myself at liberty to add only a very few words to what has already fallen from my noble and learned friends ; but as it was not in my power to know what might be the opinion ultimately formed by them, I committed to paper (which I very rarely do) my views upon the subject. And after the very extended argument at the bar, and as there are many points upon which, I

¹ 3 Mylne & C. 773, 9 Sim. 264.

² 1 De G., M. & G. 721.

³ 1 De G., M. & G. 521.

regret to say, considerable doubts seem still to prevail, I shall not hesitate to read to your Lordships what I have thus prepared.

[After fully stating the facts of the case, his Lordship proceeded.]

It is not difficult to decide upon the law when the facts are understood. The appellants contend that the contract was illegal : 1. Because the object of the company was to evade the Act of Parliament, in which scheme Hawkes joined. 2. Because the contract was *ultra vires*. 3. Because Hawkes was only tenant for life of the greater part of the property. 4. Because it was not a fit case for specific performance.

* 367 * The first objection may be answered by a simple reference to the facts. The intention to substitute a direct diverging line was the scheme of the appellants ; and I regret to hear them, at the bar of this House, rely on what they describe as their own illegal act, as a ground to relieve them from a *bond fide* contract. But the respondent was no party to the alleged illegal intention ; it does not appear ever to have been communicated to him. Every act and document bear against the assertion that he knew of the plan. The bill before Parliament and the plan deposited showed no such line ; but, on the contrary, they showed the curvilinear line. We must look at the state of things as they stood at the date of the contract. The heads of the agreement, and the agreement itself, contain no reference to any such line ; and the notice by the appellants of abandonment of the contract refers only to the line authorised by the Act, and not to the direct diverging line. All this is conclusive. It seems, however, that there was no fraud practised on Parliament, for Mr. Borthwick, the engineer of the company, did state to the committee on the bill the intention to make the direct line, and that the directors had obtained Mr. Hawkes's and other properties, which would include it, without the aid of an Act of Parliament. I am by no means certain that this was not a correct view of their powers. Parliament prohibited the making of the direct line, but did not extend that prohibition to the curvilinear diverging line. The fact that the purchase by the company of Hawkes's property was brought before Parliament is important ; and although no direct diverging line had then been projected, yet that property, as to a portion, was directly affected by the bill ; and the whole might have been taken, under the Act, for extraordinary purposes,

and the whole would, as a * residence, have been deteriorated by the contiguity of the railway ; and I should, besides, be of opinion, that, where the directors of a railway company, wanting part of a property, purchase more of it than is required, although that may become a question between them and their shareholders, yet they cannot, on that account, avoid the contract with the seller. I am, of course, not speaking of a compulsory sale. Upon all these circumstances the appellants were fully competent to form their own opinion in entering into the contract with the respondent.

Secondly, it was argued that the contract was *ultra vires*. The first ground alleged for its being so I have already adverted to. It was then said that there was no capital which could be applied to the payment of the purchase ; for the additional capital, which alone could be applied to the construction of the new line, had not been raised ; and it would be *ultra vires* to apply any portion of the old capital. This was much relied upon ; and several cases were referred to where capital had not been allowed to be so misapplied. But none of those cases properly bears upon the present. Capital raised, for example, for a new line, cannot be applied to the main line, although the new one is abandoned. A railway company cannot, with funds raised for a railway, construct a canal, or add steamboats to the concern ; for that would be foreign to the object for which the company was incorporated. But this does not bear upon the case before the House ; for, as I have shown, in either view, whether the direct diverging line was or was not to be made, the respondent's property was within the Act, and might properly be made the subject of purchase by the company.

It was indeed insisted that equity would not only have granted an injunction against the making of the line from * Wisbeach to Spalding at the expense of the old capital, * 369 but that such an injunction might now be obtained by shareholders. Because in any given case an intended misapplication of capital might be stopped, it was argued that after the scheme was sanctioned by Parliament, still it might be prevented, unless the funds were specially appropriated to the object. And here it was insisted that the old capital could not be applied to the new branch. I have already shown that the company had only a permissive power to raise additional capital ; that the new line was to form part of the original railway, and all subscribers

general scope of which I am very much inclined to concur. Mr. Justice Wightman rested his opinion on other grounds, as he thought the agreement illegal in itself. My noble and learned friend the Lord Chief Justice was of opinion that the agreement was *ultra vires*, in which view he dissented from his brother Judges; but he did not carry the doctrine to an extent which would impeach the decree in this case; on the contrary, referring to that decree, he observed that he thought that I had most properly, because entirely in harmony with the cases already decided, decreed in this case a specific performance of an agreement between a railway company and a landowner to purchase a house and six acres of land, the directors of the company having ample power to enter into that agreement. And the Lord Chief Justice observed, that he did not think that the case of purchasing a piece of land for the enlargement of a terminus, or any agreement for furthering the legitimate objects of the company, which might be lawfully carried into effect without the special authority of Parliament, would afford any analogy for the decision of the case then before the Court, where the covenant could not be lawfully performed without the special authority of Parliament. And my noble and learned friend showed that the mere circumstance of a covenant by directors in the name of the company being *ultra vires* as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it.

* 373 Lord Langdale, in a very early case on this subject, *Colman v. The Eastern Counties Railway Company*,¹ showed that it did not necessarily follow from his decision that the directors of this very railway company could not guarantee profits and capital to a steam packet company in connection with the railway, that therefore they could not do the least thing not expressly mentioned in the Act. He believed that directors had the power to do all such things as were necessary and proper for the purpose of carrying out the intention of the Act of Parliament, but that they had no power of doing any thing beyond it. In the late case in the Queen's Bench, to which I have referred, Mr. Justice Coleridge quoted this passage of Lord Langdale's judgment, as showing an evident anxiety to guard against a literal strictness, which would be inconvenient and unreasonable.

These opinions seem to me fully to support the decree now com-

¹ 10 Beav. 17.

plained of. The appellants, as a corporation, have all the powers incident to a corporation, except so far as they are restrained by their Act of incorporation. Directors cannot act in opposition to the purpose for which their company was incorporated, but short of that, they may bind the body just as corporations in general may do. The opinions of some of the Judges in the *Norwich Case* favour the disposition which I feel to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express, or implied from the nature of the corporation and of the contract entered into. My noble and learned friend the Lord Chief Justice, who thought that in that case the directors were not bound, yet laid down the rule in a way which would *support the opinion I am now submitting to your *374 Lordships.

We have not here to contend with the difficulties with which Lord Cottenham successfully grappled in *Edwards v. The Grand Junction Railway Company*,¹ and in *Stanley v. The Chester and Birkenhead Railway Company*,² which latter case was acted upon by my noble and learned friend on the Woolsack, when Vice-Chancellor, in *Preston v. The Liverpool, &c. Railway*.³ For we have not to fix a corporation, after incorporation, with completing a contract made by the promoters before the bill passed, nor have we to compel one railway company to perform an agreement by the promoters of another company not then constituted. I refer to those cases only to show the extent to which the Court has properly gone in order to bind railway companies by *bona fide* contracts entered into, even in contemplation of their incorporation.

I may here observe, that it is well settled that the abandonment by an interested party of his opposition to a bill is of itself a good consideration for a contract, and this consideration the Eastern Counties Company at once obtained. As I referred to the authorities on this head, when I delivered judgment in the Court below, and that judgment is reported,⁴ I will not detain your Lordships by now going through them. It is sufficient to say that they are conclusive. The view of the Legislature is shown in the 13 & 14 Vict. c. 83, to facilitate the abandonment of railways, for it provides in section 19 that it shall not extend to release the company from any liability to complete the purchase of any land under

¹ 1 Mylne & C. 650.

² 1 Sim. N. S. 586.

³ 3 Mylne & C. 773.

⁴ 1 De G., M. & G. 737.

* 375 any contract in * part performed, or by virtue or in pursuance of which a specific sum or price as the consideration for the purchase should have been fixed, notwithstanding the time for completion should have been subsequently extended.

It is equally clear that the contract, although before the Act, is binding, and that it was not necessary to embody the terms of the contract in the Act itself. This is strongly supported by Lord Eldon's opinion in the *Vauxhall Bridge Company v. Earl Spencer*,¹ in which he did not agree with the opinion of Sir John Leach, when the case was before him.² This contract was dependent only, as expressed therein, on the bill passing in its then, or any modified shape, which is proved by the evidence of the company's solicitor. Few contracts have been more deliberately entered into.

3dly. It was objected that Hawkes was only tenant for life, and that a good title cannot now be made to the company. The Court of Chancery was of a different opinion; but I do not think it necessary to consider that question, because the directors bought with full knowledge of the nature of the title, and contracted to pay the expenses of making a title, and to obtain powers in the bill then before Parliament, or otherwise to enable them to acquire a title. If the powers in their Act, in conjunction with the Lands Clauses Consolidation Act, do not enable them to get a good title, it is owing to their own default and delay. Indeed they have carefully avoided taking any step towards acquiring a title, as the decree of the Vice-Chancellor shows; and I am of opinion that it rests with themselves to take such steps as they may be ad-

* 376 vised, to vest the title * in themselves, and to enable them to resell the property. Equity does not hesitate to compel a purchaser to accept a title without further inquiry, where he knew the nature of it, and by his delay has disentitled himself to the usual advantages of a purchaser. In this case the company will have no great difficulty in establishing the title if your Lordships should hold the appellants bound by their contract.

In the case of an ordinary purchaser, who had conducted himself as these appellants have done, the Court would have enforced the contract against him without hesitation. And although a corporation can only contract under seal, yet I am of opinion that corporations are bound by their conduct, and by the acts of their solicitors after their contract, just as an individual would be. It

¹ Jacobs, 64.

² 2 Madd. 356.

would be absurd to say, for example, that they could only accept the title under their common seal, or that delay would not affect their rights under the contract.

4thly. This brings me to the last objection, viz. that Hawkes should be left to his remedy at law, and is not entitled to a specific performance. Upon this point I cannot entertain any doubt. In cases of contracts binding on railway companies, in the view of equity, the Court goes beyond the law. Now, specific performance is the right of every seller, as well as of every purchaser, unless it can be displaced. It has been said, but has long since been overruled, that a seller may go to law, as he only wants the money, whereas the purchaser wants the estate; but a seller wants the exact sum agreed to be paid to him, and he wants to divest himself legally of the estate, which after the contract was no longer vested in him beneficially. This is accomplished by specific performance, whereas, at law, he would be left with the estate on his hands, and * would recover damages only according to the views * 377 of a jury. He is entitled to a complete remedy, and if you refuse him a specific performance you deprive him of that which you accord to the purchaser. Look at the consequence. Equity, immediately after the contract, considers the purchaser as owner of the estate; he may sell or devise it; it would descend to his heir; it is no longer the property of the seller; on the other hand, the money, the price, belongs to the seller; he may dispose of it as part of his personal estate, and it would go to his personal representatives as such. Now, if you capriciously withhold specific relief a seller can never be sure what is the nature of his interest; as, for example, whether the estate will go to his heir, or the price to his next of kin. This rule applies as forcibly to a railway company as to an individual. In my opinion it applies with even more force in a case like this. For when a railway company purchases property, nothing but a specific performance would answer the object of the company, and the Legislature has taken care to insure that object; whereas, in many purchases, it is indifferent to a purchaser whether he obtains the estate or damages. The remedy of a seller in a contract for a sale to a railway company ought to be coextensive with the remedy of the company.

It was said that there could not have been a decree for specific performance against Hawkes if the appellants had not intended to

make the railway. This was probably founded on the observation to that effect by Lord Justice Bruce in the case of *Lord James Stuart v. The London and Northwestern Railway Company*.¹ But in the case supposed it might amount to a fraud on the part of directors to obtain compulsory right to buy * 378 land for a * purpose which they had deliberately abandoned. That cannot affect the right of a seller *bond fide* to a railway company, where the contract was for the purposes of the company, and the company had power to make it, and to apply the land to its destined purpose. Besides, in a case like this, where a part of the estate is under settlement, the seller could not resell the estate, but must keep it on his hands. The appellants have powers to buy, but the owner thus circumstanced can sell to them alone; no act of the appellants subsequent to the contract can release them from it. In a case between railway companies (*The Shrewsbury and Birmingham Railway Company v. The London and Northwestern Railway Company*),² Lord Justice Turner observed: "The agreement being under the seal of the three companies, the plaintiffs are, of course, *prima facie* entitled to a specific performance." This is precisely what every equity lawyer would say. The seller has done all on his part. He furnished the abstracts in time, warned the purchasers to be prepared, left possession of the property in order to be enabled to deliver it to them, gave up his trade, and at length filed a bill one year and a half before the time expired within which the appellants had power to complete their works under the Act. Now, if you leave the seller to his remedy at law in a case like this, and he should be an owner in fee, and could not sell the property to any one, he would, of course, in its present state of deterioration, be compelled to sell it for what it would fetch, for having a new residence at a distance, he could not protect the property as the appellants, who are on the same spot, can do.

But then they say he may recover damages at law; that his title to damages would be governed by his personal * 379 * rights, or, in other words, as he is only tenant for life of a large part, he could only recover to that extent of interest. This shows how inadequate the remedy at law would be, and that is conclusive against the argument which would restrict

¹ 1 De G., M. & G. 721.

² 4 De G., M. & G. 129.

the respondent to a proceeding at law. For the seller here is, in the view of equity, the owner or representative of the fee, as the Act of Parliament operates for his benefit connected with the contract, and the whole money agreed upon must be paid and secured for the person entitled. For the binding nature of a contract to apply to Parliament for powers to carry a contract into effect, I may refer to the case of *The Great Western Railway v. The Birmingham and Oxford Junction Railway Company*,¹ which I referred to in the Court below.

It remains only for me to observe that there is no authority against the opinion which I have expressed. The two cases relied upon before the Lords Justices, in one of which my noble and learned friend on the Woolsack concurred, depended, as has been clearly shown, on the contract being vague or contingent. Lord Justice Knight Bruce agreed in the decrees in both of those cases, from which it was inferred that he had changed his opinion upon this case; but that is a conclusion which he expressly guarded against by distinguishing between the cases, and declaring his opinion still to be that this case was rightly determined.

The two cases of *Webb v. The London and Portsmouth Railway Company*, and *Lord James Stuart v. The London and Northwestern Railway Company*, were, as I have already observed, decided on appeal upon the vagueness and contingent nature of the agreement; but in the Courts * below, where the agree- * 380
ments were not considered open to that objection, specific performance was decreed. In the first case, Sir James Wigram treated the contract as clearly one to be specifically performed, just like any contract between two individuals; and the latter case was decided in the Court below, upon the authority of the former.

The case of *Gooday v. The Colchester Railway Company*² was decided before my decree in this case, but was not then reported, and it was not referred to in the argument addressed to me. The case was decided upon the ground that there was no binding contract, for that what was set up as such was entered into by a mere agent on behalf of a railway company. The Master of the Rolls observed, that it was clear that no direct contract had been entered into between the plaintiff and the present company, because the company did not exist at the time, and could not therefore enter into any contract; and it was not a contract with the old company,

¹ 2 Phillips, 597.

² 17 Beav. 182.

because it was neither a contract under the seal of that company, nor one which it had the power to make. These observations seem to show that the facts are not fully stated on the face of the report. The Master of the Rolls agreed with the decision in *Edwards v. The Grand Junction Railway Company*, but although he held that the directors were enabled to obtain their Act by the plaintiff's withdrawing his opposition, and which was one of the terms on which the contract was entered into, yet he held that if the directors did not exercise the powers of the Act, that would be a very slight advantage. It appears to me that the conduct of the directors after the Act, in relation to the execution of their

* 381 powers, could not absolve them from * liability in respect of the benefit which they secured by the withdrawal of the opposition to the bill. However, that case is no authority against specific performance in the present. The learned Judge was probably embarrassed by the reversal of the decrees in *Webb v. The London and Portsmouth Railway Company*, and in *Lord James Stuart v. The London and Northwestern Railway Company*.

Lord Cottenham, in *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*, seems to have been clearly of opinion, not only that equity would direct specific performance of a contract by one railway company to sell its railway to another company, but that if the whole of the agreement could not be executed, it might be enforced *pro tanto*, and that it was no objection that the agreement provided that all necessary powers were to be sought from Parliament to give effect to its stipulations. His observations on this latter point¹ are well worthy of attention.

Upon the whole, I am clearly of opinion that the decree was right, and ought to be affirmed with costs. I trust that this decision, and the decisions of this House during the present session in the cases of the *National Exchange Company v. Drew*² and in *Bargate v. Shortridge*,³ will place the powers and liabilities of directors and their companies in making contracts, and in dealing with third parties, upon a safe and rational footing. They do not authorise directors to bind their companies by contracts foreign to the purposes for which they were established, but they do hold companies bound by contracts duly entered into by their

¹ 2 Phillips, 597, 604, 605.

² Ante, 297.

³ 2 Macq. 103.

directors for purposes which they * have treated as within * 382 the objects of their Acts, and which cannot clearly be shown not to fall within them; and they further hold companies to be bound by a continued course of dealing by their directors with third persons in relation to their shares, although that mode of dealing is contrary to the regulations of their deed of management. I hope that we shall have no other cases before us where the defence of a company rests upon the want of power to make a contract which the directors deliberately entered into, and under which they took a benefit, or upon the irregularities of their own proceedings.

• *Decree and order appealed against affirmed, with costs.*

Lords' Journals, 11 July, 1855.

1855. July 3.

JOSEPH PLACE, *Plaintiff*.

TAYLOR POTTS and WILLIAM ORTON BRADLEY, *Defendants in error*.

Admiralty Court. Jurisdiction. Plea in Bar.

In an action by a shipowner against the charterers for freight, the charterers pleaded that after the freight had been earned, and after the commencement of the suit, the obligee of a bottomry bond, by which ship and freight were hypothecated, instituted in the Court of Admiralty a suit against ship and freight, whereon a monition issued, commanding the plaintiff to bring into Court the proceeds of the wreck and stores of the ship, and the defendants to bring into Court the money due for freight, to abide the judgment of the Court, and that the defendants had done so:—

Held, affirming the judgments of the Courts of Exchequer and Exchequer Chamber, that this was a good plea in bar to the action.

Construction of the 3 & 4 Vict. c. 65.

THIS was an action to recover 521*l.* 7*s.* 5*d.* for freight, brought in the Court of Exchequer by the plaintiff, the owner of the barque "Brilliant," against the defendants, the charterers of that vessel. The declaration was in the common form.

The defendants pleaded, first, except as to 386*l.* 17*s.* 9*d.*, never indebted; and, secondly, as to that sum, that while the goods were on board, and before the commencement of the voyage, the master was compelled to borrow for the use of the ship and the purposes of the voyage the sum of 262*l.* 11*s.* 4*d.*, from one G. B. Symes, upon a bottomry bond, whereby ship and freight were hypothecated; that after the freight was earned, and after the commencement of this suit, Symes instituted a suit upon the bond in the Court of Admiralty against the ship and freight, whereupon a monition issued, commanding the plaintiff to bring into Court

the proceeds of the sale of the wreck and stores of the ship,
 * 384 and the defendants to bring into Court the * money due from them for freight, to abide the judgment of the Court, or show cause to the contrary; that having no cause to show, the defendants, in obedience to the said monition, paid the said freight into the said Court of Admiralty, to abide the judgment of the said Court.

The plaintiff joined issue on the first plea, and upon that issue a verdict was entered for the defendants. To the second plea the plaintiffs demurred. The Court of Exchequer gave judgment for the defendants.¹ This judgment was affirmed in the Exchequer Chamber.² The present writ of error was then brought.

The Judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Maule, Mr. Justice Coleridge, Mr. Justice Cresswell, Mr. Baron Platt, and Mr. Justice Williams attended.

Mr. C. E. Pollock for the plaintiff in error. — This plea is bad. It admits a cause of action, without showing a good bar to that action. It merely alleges the existence of another suit in respect of the same property, but not necessarily deciding, nor capable of deciding, the same rights. The case of *Harmer v. Bell*,³ shows that where, as in this case, one proceeding is *in personam*, and another *in rem*, the pendency of either is not an answer to the other. There the first action was commenced in England, but before the vessel could be arrested it sailed for Scotland. An action by the same parties and for the same cause was there commenced, and the vessel was arrested, in order to compel the appearance of the defendants, the owners; that was a suit *in*

¹ 8 Exch. 705, where the pleadings are fully set out.

² 10 Exch. 370.

³ 7 Moore, P. C. 267.

personam. The vessel afterwards returned to this country, and was here arrested by process from the Court of Admiralty. The action here * was *in rem*; and the pendency of the * 385 Scotch action, the two proceedings being entirely unlike each other, was held to be no answer to the suit in the Court of Admiralty. The present is the converse of that case; and the same principle governs both, namely, that the two suits being in their nature different, the pendency of one is no answer to the right to maintain the other.

In the Court below, the judgment went on the assumption that the Court of Admiralty possessed a jurisdiction which could effect complete justice between all the parties interested. The case of "*The Dowthorpe*"¹ was the authority relied on; but though Dr. Lushington there expresses his belief that the Admiralty Court possesses such jurisdiction, under the Statute 3 Vict. c. 65,² it is submitted that that opinion is not warranted by the provisions of the statute itself. Besides, there the parties were the owner and the charterer alone; here they are the owner and charterer, with the obligee of the bond intervening between them, and seeking, by a proceeding in another Court, to defeat the claim of the owner here. The plea, to be complete here, ought to show that the defendants had not been guilty of any act to oust the plaintiffs of what they were entitled to; that they had not made a voluntary payment; for otherwise they are not protected in making it. *Webb v. Hurrell*,³ where all the authorities are cited, shows that a plea previously levied in the Mayor's Court of London is a good plea in bar to an action in one of the superior courts of Westminster Hall; but it does not show that the pendency of a suit subsequently brought would be equally a good plea. *Humphrey v. Barns*⁴ expressly declares that it is against the dignity of the superior Courts to have * inferior Courts — and such, in * 386 fact, is the Court of Admiralty — interfere with their jurisdiction; and one of the grounds on which that case was decided was, that the foreign attachment issued while the suit in the Common Pleas was actually depending. In like manner, on the admission in the plea, that the vessel had earned the freight, so that there was no question of the existence of a debt, and that an ac-

¹ 2 W. Rob. 73.

² But see the case of "*The Fortitude*," 2 W. Rob. 221, 223, 224.

³ 4 C. B. 287.

⁴ Cro. Eliz. 691.

tion had been brought, the plaintiff had a right to recover, and the defendant had no right to retain the freight actually earned, and to pay it into the Court of Admiralty in a suit subsequently commenced.

If it should be said that the defendants might have been exposed to hardship, the answer is, that they might have applied to the Court of Admiralty, to stay proceedings there till the decision was pronounced here; or have made some application of that kind here; or have gone into equity for relief. *Duncan v. M^c Calmont*.¹

[THE LORD CHANCELLOR. — Would it be an answer to the suit in the Court of Admiralty to plead the pendency of a suit in a Court of common law?]

It would not. The only good plea would be, that there had been payment of the money. It is the same here. The only cause that the defendants show for having been put in peril in the Court of Admiralty is that they had not paid, when it became due, the freight which the plaintiff's vessel had earned. The money was then in their hands wrongfully, for their contract was unperformed by them, and, but for this wrongful possession of the money, the monition would not have issued out of the Court of Admiralty. They cannot in this way take advantage of their own wrong.

* 387 * *Mr. Bramwell* and *Mr. Honyman*, for the defendants in error, were stopped.

THE LORD CHANCELLOR proposed the following question for the consideration of the Judges: Whether, looking at this record as it now stands, the plea affords a good answer to the action?

The Judges conferred together for a short time, at the end of which —

MR. BARON PARKE said: My Lords, I am desired by her Majesty's Judges, in answer to your Lordships' question, to say that the plea is a good plea, and is a good answer to the action. They are of that opinion, for the reasons stated in the judgment delivered by me in the Court of Exchequer, and afterwards confirmed

¹ 3 Beav. 409. The suit there was not proceeded in; the plaintiffs moved to dissolve their own injunction, and the validity of the bottomry bond was established in the Court of Admiralty. The case of the "*Lord Cochrane*," 2 W. Rob. 320.

by the judgment of the Court of Exchequer Chamber. If this proceeding in the Court of Admiralty was a mere temporary bar, by which the remedy of the plaintiff was suspended till the opinion of that Court had been pronounced upon the bottomry bond, the plea would amount only to a plea in suspension of the action, and would therefore be bad. But if the Court of Admiralty has jurisdiction, as we think it has, over the whole matter, and can determine all questions of title to the ship, or the proceeds of the ship, arising in any cause of bottomry,¹ then the plea sets up that which is a bar, and not a mere suspension, and is good. The cases cited as to foreign attachments have not, under such circumstances, any application. The process is not the same, nor are its consequences the same. The proceedings in the Court of Admiralty are *in rem*. The defendant is bound, upon monition, to pay in the money, and to submit to the jurisdiction; and the Court of Admiralty can finally dispose of all the * questions arising with rela- * 388
tion to the matter of which it is thus possessed.

THE LORD CHANCELLOR. — I entirely concur with the opinion which has just been delivered to your Lordships in this case. The Courts of justice would be ancillary to oppression if they did not hold this to be a good plea; for the Court of Admiralty has jurisdiction over the matter of the whole dispute, which, under the provisions of the statute, is now brought within its jurisdiction. That Court can now finally dispose of the interests and claims of all the parties in conflict; and it would be against the first principles of justice to force any of them to try over again the same questions in another Court. I have no difficulty, therefore, in moving your Lordships to affirm the judgment of the Court below.

LORD BROUGHAM was entirely of the same opinion.

Judgment for the defendants in error.

¹ See 3 & 4 Vict. c. 65, §§ 3, 4.

DAY v. DUBERLEY.

1855. July 16.

GEORGE DAY and others, *Appellants*.JAMES DUBERLEY and others, *Respondents*.

THIS was an appeal against an order of the Master of the Rolls, who had decided that a wife's reversionary interest in leaseholds could not be assigned by the husband, if that interest was of such a nature that it could not possibly vest in the wife in possession, during the coverture. [See 16 Beav. 33.] When the appeal was called on, no one appeared on either side, and therefore

The appeal was dismissed.

* 389 * BANK OF IRELAND v. EVANS'S CHARITIES.

1855. June 25, 26, 28; July 2.

The GOVERNOR AND COMPANY of the BANK	} <i>Plaintiffs in error.</i>
OF IRELAND,	
The TRUSTEES of EVANS'S CHARITIES in	} <i>Defendants in error.</i> ¹
Ireland,	

Bankers. Trustees. Corporate Seal. Negligence. Bills of Exception. Practice.

On the trial in Dublin, of an action between A. and B., the Judge gave certain directions to the jury, to which A. objected; he tendered a bill of exceptions, which (according to the provisions of the Irish Statute 28 Geo. 3, c. 31) was duly signed by the Judge, and was afterwards argued in the Court in which the action was brought. That Court adopted the exceptions and ordered a *venire de novo*, and a new trial took place, the Court deciding that such was the proper course. B. did not appear at the second trial. On the first trial, the verdict had been given for B.; on the second it was given for A., and judgment was pronounced thereon in his favour; B. brought a writ of error, and then, finding that the *postea* and all the proceedings relating to the first trial had been struck out of the record, which from the first *venire* went on with formal con-

¹ *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 694, Law Rep. 1 H. L. 98.

tinnances only to the second trial and verdict, he applied to the Court in which the action was brought, to have these omissions supplied. That Court refused to supply them : —

Held, that this mode of proceeding was erroneous, and this House ordered the Court in which the action was brought to amend the record, by entering on the plea roll the first trial, the exceptions, and the award of a *venire de novo*.

Held also that B. was not bound to appear at the second trial.

Trustees of a charity in Dublin incorporated by Act of Parliament, and having a common seal, possessed stock in the public funds, which stock was in Ireland registered in the Bank of Ireland. G., the secretary of the incorporated trustees, was allowed to have the seal in his possession. Five several powers of attorney prepared in different years, sealed with the seal of the incorporated trustees, the due affixing of which seal was attested by witnesses, who (though without any fraudulent intention) attested what was not true, since the seal was affixed by the unauthorised act of the secretary alone, were presented to the Bank, and the stock was transferred. The facts were afterwards discovered, and G., the secretary, was indicted and convicted. By a power of attorney duly executed, the trustees then authorised C. to transfer the *stock, but the Bank refused to make the transfer. An action was *390 brought by the trustees on this refusal; the Judge who tried the cause told the jury that if under these circumstances the trustees had so negligently conducted themselves, as to contribute to the loss, the verdict must be given for the Bank. On exceptions for this direction : *Held*, that it was wrong.

TRESPASS on the case. The declaration contained seven counts. The first count stated the Act 59 Geo. 3 (Ireland), c. 37, by which certain persons, separately named therein, were constituted “ trustees of the charities of Joseph Evans,” by which name they were to have perpetual succession and a common seal. It then alleged that the plaintiffs were trustees under that Act, and were as such possessed of 9300*l.* in the 3¼ per cent. stock standing in their names in the books of the defendants, which the defendants were bound, on request duly made by the plaintiffs, or their lawfully authorised attorney, to transfer; that plaintiffs had not before the time, &c., by themselves or their attorney, transferred the said stock; that in February, 1847, they authorised one Alexander Colles, as their attorney, to transfer the said stock, and that he required the defendants to permit such stock to be transferred to the name of John Johnson, but that the defendants refused. There were other counts varying the form of the allegation, and applying it to the portions of the sums of which this gross sum was composed.

The defendants pleaded not guilty.

The cause was tried at the Court of Queen's Bench in Dublin,

before Lord Chief Justice Blackburne, at the sittings after Michaelmas Term, 1847, when the plaintiffs proved their act of incorporation, and gave in evidence a consent, by which certain facts were admitted. One of these was, that one William Grace had pre-

presented to the defendants five letters of attorney, purporting
 * 391 to be executed * by the plaintiffs, and authorising the transfer of the stock in question ; the conviction of Grace for forging these letters by fraudulently affixing the corporation seal thereto, and the subsequent refusal of the defendants to transfer to the order of Colles. The signatures to the letters of attorney were genuine, but the seal of the corporation had been affixed, without authority, by Grace, who took advantage of his being secretary to the trustees, and thereby having the custody of the common seal.¹ The defendants proved that in each case the letter of attorney was lodged with the Bank on the day before it was acted upon, that the broker procured the forms of these letters from the Bank and sent them to Grace, by whom they were severally returned executed ; that he lodged them, so executed, at the Bank, and, in each case, upon the next day made the transfer, and received and remitted the produce to Grace. The Lord Chief Justice told the jurors that if they believed the evidence offered by the plaintiffs in support of the issues, that the five letters were forgeries, then the verdict ought to be for the plaintiffs, unless they at the same time believed that the use made of the common seal of the trustees, whereby the defendants were imposed upon, was caused exclusively by the negligence or default of the plaintiffs, in which case the verdict must be for the defendants. And further, if the jurors in so considering whether the use so made of the common seal of the plaintiffs was the exclusive cause of the imposition and fraud practised on the defendants, should also
 consider that there was any neglect on the part of the de-
 * 392 fendants * to examine the letters of attorney, and inquire into their genuineness, so that such negligence contributed in any degree to the said imposition and fraud, the verdict must be for the plaintiffs. The plaintiffs' counsel required the Lord Chief Justice to tell the jury that if the letters of attorney were

¹ The third section of the Act incorporating the trustees of these charities gave to any meeting of trustees, or to the majority there present, provided such majority should consist of three trustees at the least, power "to order and dispose of the common seal of the said corporation, and the use and application thereof."

forgeries the verdict must be for the plaintiffs, notwithstanding the evidence of default on their part; and they further required him to direct the jury that if the plaintiffs had not beforehand authorised the affixing of the common seal to the letters of attorney, or had not afterwards adopted the same, or the transfer made under it, the verdict must be for the plaintiffs. His Lordship refused so to direct the jury, and a bill of exceptions was tendered to the direction on both points.

The jury returned a verdict for the defendants.

The bill of exceptions was argued before the Court of Queen's Bench¹ (three Judges only being present) in Trinity Term, 1848, and in Michaelmas Term of that year judgment was given.² Mr. Justice Perrin thought that there was no evidence that the plaintiffs furnished occasion for the commission of the fraud and deception; that consequently the direction was wrong, and that there must be a *venire de novo*. Mr. Justice Crampton was of the * same opinion, and the Lord Chief Justice, without ob- * 393
servation, assented to a *venire de novo*.

On the award of the *venire* the case was brought to trial in Hilary Sittings, 1849, and the defendants not appearing, as they intended to bring a writ of error, and were advised that no such writ would be allowed till after the second trial, a verdict was entered against them by default.

The record on the giving of judgment in the Court of Queen's Bench on the bill of exceptions was thus made up: there were set out the pleadings, the award of the *venire facias juratores*, and the continuances from Trinity Term, 1847, to Hilary Term, 1849 (entirely omitting any notice of the first trial), the return by the sheriff on the first day of Hilary Term, 1849, of the writ of *venire*, with the panel of jurors annexed, the writ of *distringas* returnable

¹ 28 Geo. 3, c. 81, § 1 (Ir.), after reciting that the carrying a cause by bill of exceptions to a superior Court, is a cause of great expense, enacts "that it shall be sufficient if the Judge to whom such bill of exceptions shall be tendered, sign the same, and that it shall not be necessary for him to put his seal thereto, and that such bill of exceptions, so signed, shall remain with the clerk of Nisi Prius, and be incorporated into the *postea*, and be returned therewith to the Court in which the action is brought, which Court shall have authority to examine the same and give judgment thereon, or make such order either by arresting the judgment, granting a *venire facias de novo* or otherwise, as shall be agreeable to justice." See *Galway v. Baker*, 7 Clark & F. 376.

² 12 Irish Law, 365.

on the 1st of February, the appearance of the jurymen, the fact that they were sworn and tried the cause, and found a verdict for the plaintiffs for 9602l. 9s. 7d. and 6d. costs, and the judgment thereon for the plaintiffs.

In April, 1849, the defendants moved in the Exchequer Chamber that in case judgment should not then have been made up, the several proceedings, as they stood of record on the files of the Court of Queen's Bench, should be included in the record, which should then comprise "the pleadings up to the first trial, the trial, the Judges' direction, the bill of exceptions taken by the plaintiffs, the judgment ordering a *venire de novo*, and the verdict and judgment thereon"; but this application was refused as premature.¹

The application was in substance renewed after some other proceedings had taken place, and the Court of Exchequer Chamber having sent back the case to the Court of Queen's Bench, that Court held² that "where there had been two trials, and a verdict had on the first trial in favour of the defendants, which verdict was set aside on a bill of exceptions taken to the ruling of the Judge, and a *venire de novo* awarded; and where, on the second trial, a verdict was had in favour of the plaintiffs, by default of the defendants in not appearing, and the judgment was made up, omitting the bill of exceptions and award of *venire de novo*, a motion to amend the record by introducing therein all the proceedings, comprising the pleadings up to the first trial, the record and finding of the jury, bill of exceptions, and judgment thereon, was untenable. That such judgment was regular, being founded on the *postea* and verdict therein recited, and that the bill of exceptions and the order for the *venire de novo* constituted no part of the record of the final judgment — [Blackburne, L. C. J. *dissentiente*]. That the 28 Geo. 3, c. 31, contemplates the award of a *venire* as but an order on motion, and therefore an application to incorporate into the judgment the bill of exceptions, and the order for a *venire de novo* is untenable — [Blackburne, L. C. J., *dissentiente*]. That the Court of Exchequer Chamber had no power over the records of other Courts."

The case itself was argued, on the exceptions, in the Exchequer Chamber in June, 1852, when judgment was given by the Court for the defendants in error (the trustees), allowing the exceptions

¹ 1 Irish Law, N. S. 393.

² 1 Irish Law, N. S. 408.

and affirming the judgment below by a majority of eight to one.¹ The present writ of error was then brought.

* *Sir F. Kelly* and *Mr. Napier* (*Mr. Willes* and *Mr. Darley* were with them) for the plaintiffs in error. — * 395

There was diminution in this case. All the proceedings in the first trial ought to have been set out on the record, and it would then have appeared that there was a verdict for the defendants which had not been properly annulled, and which therefore stood in full force. The Court of Queen's Bench in Ireland was wrong in treating an award of a *venire de novo* as a mere order for a new trial, to which the party successful at the first trial is bound to submit: for the result of that is, that the party against whom the exceptions are allowed cannot have a writ of error on that allowance, but is bound by it without appeal, and must proceed to a new trial, and then himself tender a bill of exceptions on any error in law. Yet such has been the practice of the Court of Queen's Bench in Ireland.

[LORD CAMPBELL. — The bill of exceptions not forming part of the record? THE LORD CHANCELLOR. — And so the parties are to go on *toties quoties* till some bill of exceptions is disallowed?] That is the result of what has been done here. The law as to exceptions was the same in the two countries until the 28 Geo. 3, c. 31 (Ireland), but the only * differences introduced by * 396 that statute were, that the Judge was to sign instead of sealing the exceptions, and that they were to be first argued in the Court from which the record came. The words are, that "the Court shall give such judgment thereon or make such order as

¹ 3 Irish Law, N. S. 280. The marginal note there, so far as the point of practice is concerned, states: "Upon a bill of exceptions taken by the plaintiffs to the charge of the Judge, the Court below awarded a *venire de novo*, upon which a verdict was had for the plaintiffs, the defendants not appearing, and judgment was entered thereon. The defendants brought a writ of error on this judgment. The transcript of the record returned into this Court by the Court below omitted the proceedings on the first trial, the bill of exceptions and judgment thereon by the Court below, merely entering continuances of *Vice comes non misit breve*, from the award of the first *venire*, to the entry of the verdict on the second trial. The plaintiffs in error alleged diminution, and this Court held they were entitled to have those matters returned as part of the record. Held, that the Statute 28 Geo. 3, c. 31, having incorporated the exceptions into the *postea*, thereby made them part of the record, and that this Court was bound to consider them. Crampton, J., and Perrin, J., *diss.*"

shall be agreeable to justice." There is no distinction between those two things; they are the same; and the Legislature never intended to make the proceeding so entirely unilateral that if an order was made for a *venire de novo*, in other words, for incurring all the expense and trouble over again, the party against whom that decision was given must submit to it, but that if it was the reverse an appeal to the Court of Error would lie.

[LORD CAMPBELL. — The time of this House ought not to be wasted on a mere inquiry into the regularity of proceedings in the Court below. This House has power to correct any error of that kind. THE LORD CHANCELLOR. — The bill of exceptions ought to have appeared on the record, and then the award of the *venire de novo*; but it does not appear there at all. That error must be amended. The record must now be treated as if properly drawn up, and the case must be argued on the main question.]

As to the transfer itself, it is admitted that, except so far as concerned the affixing of the seal of the corporation, each instrument was perfectly genuine. If that act took place through the negligence of the owners of the stock, that will relieve the plaintiffs in error, the bankers, from liability. It did so take place. Grace was the servant of the trustees, was deemed a man of great respectability, and from 1836 to 1846 they allowed the seal of the corporation to remain in his possession. In the first of these years they gave him a power of attorney to receive the dividends, and that power was never recalled. By their own acts, therefore, they had given him credit with the Bank. It cannot be

* 397 * contended, under such circumstances, that in every instance, where a document with the seal of the trustees was presented at the Bank, an inquiry was to be made whether such seal had been properly affixed. By their repeatedly allowing the means of these continuous forgeries, they must be taken to have ratified the act of their secretary. They have, therefore, brought themselves within the case of *Coles v. The Bank of England*,¹ where a person, after some of her stock had been sold out on forged orders of transfer, frequently received the reduced dividends on the remainder, and she was held thereby to have adopted what was done, so as to exempt the Bank from liability to replace the transferred stock. The same principle had been declared by the Court of King's Bench in *Grant v. Vaughan*,² namely, that

¹ 10 A. & E. 437.

² 3 Burr. 1516, 1 W. Bl. 485.

where there had been negligence liability would attach, and it has since been acted on by this House in *Marsh v. Keating*.¹ That principle is likewise asserted in the judgment in *Davis v. The Bank of England*,² and it was acted on in *Young v. Grote*,³ in the latter of which the customer had, by a negligent mode of drawing a cheque, enabled a clerk to insert an amount greater than that for which it was intended to be drawn, and was consequently held not entitled to recover back the amount from the Bank. In *Barber v. Gingell*⁴ it was held that if a defendant set up the forgery of a bill drawn on him, and proved it to have been forged, it was a good answer to such a defence to show that the defendant had previously paid many other bills under precisely the same circumstances. All these cases show that when the customer acts negligently, so as to assist in occasioning the * loss, he cannot recover, and that was the direction of the Lord Chief Justice here, and it was correct. In *Beckwith v. Corral*,⁵ where a man lost his pocket-book with a bill of exchange in it, and advertised for the pocket-book, but said nothing of the bill of exchange, in an action on the bill the question left to the jury was, whether he had been guilty of negligence, and the Court held that that was properly so left. The same rule that the person guilty of negligence is the person to suffer, has been applied in other cases, as in *Bradley v. Waterhouse*,⁶ where negligence in packing goods had occasioned their loss, and in *Whitmore v. Wilks*.⁷ That such ought to be the rule, especially where bankers are concerned, is clear, for if a banker delays honouring a cheque he will be liable in damages for the loss thereby occasioned. *Sutton v. The Bank of England*.⁸

There was not in this case any evidence of negligence on the part of the Bank. The negligence was all on the part of the trustees, and therefore they cannot recover, and in leaving the case to the jury the Chief Justice was entitled to put the question, whether their negligence had not contributed to the loss. If the fact was found to be so, the direction that then the verdict must be for the defendants, the bankers, was right in point of law.

¹ 2 Clark & F. 250.

² 2 Bing. 409.

³ 4 Bing. 253.

⁴ 3 Esp. 60.

⁵ 11 J. B. Moore, 335.

⁶ Moody & M. 154.

⁷ Moody & M. 214.

⁸ 1 Car. & P. 193.

sequence naturally and necessarily followed, whether forgery or no forgery, that if the party injured by the forgery chooses subsequently to ratify what has been done, then as between him or her and the person who acts upon it, the ratification would be just as good as if it had been the previous act of the party.

Upon these grounds, I conceive that the judgment which the Court of Queen's Bench in Ireland ought to have given, and which ought now to be given, when the exceptions are properly on the record, is, that there should be a *venire de novo*, and I shall move your Lordships accordingly.

LORD BROUGHAM. — My Lords, I take exactly the same view of this case as my noble and learned friend, and the learned *415 Judges, * to whose assistance we are so much indebted, and to whom we are indebted also for the speedy way in which they have enabled us to dispose of this case.

I confess it was a result that I expected from a very early period of this argument. I had little or no doubt in my own mind of the conclusion at which the learned Judges would arrive; but it is very satisfactory to have heard that conclusion stated so ably and so clearly, and upon both points; upon the point of practice, if I may so term it, though it goes in its importance a little beyond mere practice, as well as upon the merits of the case.

My Lords, I have no doubt that the error in the Court below may be traced to confounding a new *venire* with a *venire de novo*; but be that as it may, it is perfectly clear that the learned Judges have given so clear and authoritative an exposition upon this matter as will prevent for the future any deviation from the correct course.

With respect to this case itself, I really entertain no doubt. Upon the two cases that have been referred to by the learned Judges, and by my noble and learned friend, of *Young v. Grote*, and the other somewhat doubtful case of *Coles v. The Bank of England*, I say no more, except that I agree in what the learned Judges have said upon them, and also in the doubt insinuated rather than expressed by the learned Judges, and more plainly intimated by my noble and learned friend, as to how the latter case might have been determined if it had not been disposed of in the way in which it was.

Judgment affirmed, with a direction.

Lords' Journals, 2 July, 1855.

* CARRON IRON COMPANY v. MACLAREN.

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1855. March 20, 22, 23, 26; July 11.

The CARRON IRON COMPANY PROPRIETORS, . . .	<i>Appellants.</i>
JAMES MACLAREN, HENRY DAWSON, E. H. TIBBATS STAINTON,	<i>Respondents.</i>

Jurisdiction. Foreign Court. Equity. Agent. Domicile. Notice.

If the circumstances of a case are such as would make it the duty of one Court in this country to restrain a party from instituting proceedings in another Court here, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign Court.

The fact of a foreigner having property in this country, enables the Court here to make effectual an injunction issued to him; but, especially in the case of a foreigner who seeks no assistance from the Courts here, the issuing of such injunction ought clearly to be shown to be required as conducive to justice.

Per LORD ST. LEONARDS. — A company may have two domiciles, and places of business may for the purpose of founding jurisdiction be treated as places of domicile, and service there is sufficient.

Where there is a plain equity in favour of an injunction, and the representatives of the real and personal property, who seek it, are in this country, the Court will grant it, and restrain proceedings in the Courts of a foreign country. In such a case the Court will decide upon a consideration of all the circumstances, and require parties here to take or omit such steps in a foreign Court as the ends of justice may require. The particular provisions of the foreign law applicable to a transaction, proceedings as to which in a foreign Court are thus restrained, must not be disregarded.

A company was chartered in Scotland for the manufacture of iron. Its manufactory and chief office of management were there; it had agents for the sale of the goods in different parts of Scotland and England, and it possessed real estate in both countries. A., a large shareholder in the company, and possessed of real and personal property in England and Scotland, was the company's agent for the sale of goods in London and was domiciled here. When he died, he made a will in the English form, and appointed as his executors persons who were resident in both countries; his heir was one of these persons, and was also the person who succeeded him in the London agency for the company. Probate of the will was taken out in England, and such of the executors as thought fit to apply to the Scotch Court were according to the Scotch law confirmed in the execution of the will. An administration suit was instituted in the Court of Chancery, and the usual order for a general account of the debts and assets made. After the date of *this order the iron company took pro- * 417
ceedings in the Scotch Courts against the real and personal estate of the testator in Scotland. Notice of an injunction at the suit of the executors was served on the company's agent in London, and on the company's manager

in Scotland; the company did not appear, and the injunction was issued. The company then moved to dissolve the injunction. No order was made.

Held (Lord St. Leonards *dissentiente*), that the injunction could not be maintained:—

Quære. Whether service of notice of injunction on an agent, when the principal is out of the jurisdiction, can be good service, especially when that agent is merely an agent for the sale of the goods of the principal?

Service of notice on one member of a corporation is sufficient.

THIS was an appeal against an order of the Master of the Rolls, made in a suit in which Maclaren and Dawson, as executors and trustees under the will of Henry Stainton, deceased, were the plaintiffs, and H. Tibbats Stainton, another of the trustees and executors, and also the heir at law of the testator, and other persons interested in his residuary real and personal estate, were the defendants. The suit was instituted in March, 1852, for the purpose of carrying the trusts of the will into execution; and the appellants were not originally parties thereto. The testator died possessed of considerable real and personal property in both England and Scotland.

The bill set forth, among other things, that the testator had been in his lifetime the London manager for the appellants, and, as such, was in the habit of receiving monies and making payments on their behalf; and that shortly after his death the appellants advanced a claim against his estate, in respect of assets of theirs alleged to have been in his hands at the time of his death; and the bill charged that the plaintiffs in the suit had no means of ascertaining the truth of the allegation, and were willing to act in the matters of the will as the Court of Chancery
* 418 * might direct; and it prayed for directions, and an account, and, if necessary, the appointment of a receiver.

In May, 1852, the Master of the Rolls made a decree by which, among other things, it was ordered that the Master should take an account of the personal estate of the testator, which had come to the hands of the executors, and should inquire what part, if any, was still outstanding and undisposed of, and under what circumstances, and by whom, the same ought to be got in; and that the part not specifically bequeathed should be applied in payment of debts, &c.; and the Master was directed to inquire as to the real estate of the testator, and who had been in the receipt of the rents and profits since his death; and further directions were reserved,

and any of the parties were to be at liberty to apply to the Court as there should be occasion.

On the 12th July, 1852, the three executors were, according to the forms of the Scotch law, confirmed by the commissary in Edinburgh as executors of the testator in Scotland. By this proceeding they were invested, in Scotland, with rights and powers similar to those enjoyed in England by an executor, after grant of probate. Joseph Dawson, Thomas Dawson, and William Dawson, nephews of the testator, the second and third of whom were resident in Scotland, were also named in the will as executors; but they had not accepted the trusts of the will, or proved the same in Scotland, but possessed by the Scotch law the right at any time to come in and do so.

The appellants had been incorporated in 1773, by a Royal charter, under the union seal of Scotland; their works were carried on at Carron, near Falkirk, in Stirlingshire, where the manager, who was stated in the affidavits on the part of the company to be the "sole manager," resided, where the office of the company was situated, and * the books were kept; they had *419 agents for the sale of their manufactured goods at various places in Scotland, and at London and Liverpool; they had not any works situated in England, but they rented places for the business of these agencies in England, and they had also real estate in London, Liverpool, and Cumberland. The testator had been their agent in London, and on his death the manager examined his accounts, and claimed, as due to the appellants, a debt, the principal and interest of which amounted to 108,000*l.* The testator, in addition to his other property, was, at the time of his death, possessed of shares in the Carron Company, to the amount of above 80,000*l.*

Some correspondence took place between the solicitors for the appellants and for the respondents, as to the mode of settling the claim of the appellants against the testator's estate. They could not agree on this matter, and, finally, in October, 1852, the appellants commenced an action in the Court of Session against the respondents, as executors, to recover the sum of 69,617*l.* 1*s.* 6*d.*, for principal, and the sum of 38,873*l.* 17*s.* 10*d.*, for interest thereon due from the testator. Letters of inhibition¹ and arrest-

¹ Inhibition is a process against real or heritable estate. "Inhibition" affected the testator's real (called heritable) estate in Scotland, and prevented any one

*420 ment,¹ signeted 3d November, 1852, were, at * the instance of the appellants, issued against the respondents, as executors and trustees; these letters of inhibition were executed on the 4th November, and the letters, and the execution thereof, were registered on the 6th November. On the 11th November a notice was served by the respondents on William Dawson, the manager of the appellants, at their works in Falkirk, to the effect that, on the 15th November, application would be made to the Master of the Rolls, for an injunction to restrain the appellants from further proceeding in Scotland in their suit. On the same day a similar notice was served on H. Tibbats Stainton, one of the executors and respondents, the then agent of the appellants, in London,² such notice being delivered to him at the warehouse of the appellants, in Thames Street. The appellants did not appear in the Court of Chancery, and the injunction issued, but leave was

from purchasing it from the trustees, except subject to the claim of the appellants. If the appellants established their claim and obtained a decree they would be entitled thereon, under "a process of adjudication," to take possession of the heritable estate of the testator, and make it available for the payment of the debt, subject, however, to the right of any other creditor, who might, within a year and a day, also obtain "adjudication," and so come in and participate in the produce of such real estate.

¹ Arrestment is a process against personal estate. By letters of arrestment, the appellants became entitled to arrest, or attach the personal property of the testator in Scotland as security for payment of their claim in the action, whenever that claim should be established by a decree; a process of "forthcoming" would then issue, and the personal property would be applied in payment. A multiple-pounding might be raised on the arrestment, if there were different claimants on the fund; and then all claimants would be cited.

² In order to show the insufficiency of this service, Mr. Brodie, the appellant's law agent, filed an affidavit in which he denied that H. T. Stainton was their "manager," and alleged that the said Stainton had "no power to represent the company or to do any act on its behalf, except to sell the manufactured goods of the company for the time being intrusted to him, for sale, and as proof of that fact, the affidavit set out the letter written by Stainton, on the 16th of November, 1852, accompanying the injunction which had been served on him, as the agent of the company. In that letter, Stainton said: "I stated to the party bringing the document, that I had nothing whatever to do with the affairs of the Carron Company in Scotland, where the whole of the business is conducted, and is regulated and directed, and solely carried on by the manager at Carron, under the control of the general Courts of Proprietors meeting there, and that my duty was merely the disposal of the goods sent to me for sale." The writer, however, added, "I made this statement in accordance with the suggestion contained in your letter of the 13th instant."

granted to the company to move to dissolve it on short * notice. The appellants moved accordingly, and affidavits * 421 setting forth the facts, and stating what was the law of Scotland, were put in, and the cause was heard before his Honour, who, on the 6th of December, 1852,¹ refused to dissolve the injunction, but reserved liberty to apply, so that he might, if necessary, allow proceedings in Scotland, to prevent the assets there from being swept away by creditors not within his jurisdiction. The costs of both parties to be costs in the cause.

The Lord Advocate (Mr. Moncreiff) and *Mr. Rolt (Mr. Cotton was with them)* for the appellants. — The appellants were not within the jurisdiction, nor subject to it, so as to make it possible duly to serve them with notice of an injunction in the administration suit. Secondly, if they were within the jurisdiction, still there was, in fact, no regular service of notice of motion; and thirdly, if it should be held that they were regularly before the Court, there was no power in the Court of Chancery to prevent them from proceeding in their suit in Scotland.

As to the first point, the affidavits here show that this company is a Scotch corporation, with its factory situated in Scotland, and with an agent or manager there; that the office of the company and the books are there, and that the manager who resides at Carron is the sole manager of the company. The appellants are not therefore in any way within the jurisdiction of the Court of Chancery, either by themselves or by Stainton, as their agent; for Stainton is only a salaried agent to sell the goods of the appellants, and as such cannot bind them by receiving notice of a motion on which an attachment may issue against them in a cause to which they are not parties. *Shaw v. Lindsay*² is no longer to be considered an authority for making an * attachment, with * 422 proclamations on service of subpoena in Scotland, both the cases cited there, and on which the decision proceeded, being found to be wrongly stated.³ *Johnson v. Nagle*,⁴ and the cases

¹ 16 Beav. 279, 289.

² 18 Ves. 496.

³ In the 2d ed. of Ves. Jun. Reports, Vol. 18, p. 496; the order previously granted is said to have been finally refused, as *Scott v. Hough*, 4 Brown, C. C. 213, and *Bourke v. Lord Macdonald*, 2 Dick. 587, are misreported. They were the authorities on which *Shaw v. Lindsay* was originally decided. See *Scott v. Hough*, 4 Brown, C. C. 213, 5th ed.

⁴ 1 Molloy, 240.

there cited, in notes, especially that of *Meredith v. Willett*, are the other way. Though the case of *M^r Master v. Lomax*,¹ which raised a doubt whether the 2 & 3 Wm. 4, c. 33, extended to Scotland, may now be considered as overruled by that of *Cameron v. Cameron*,² still it is clear that there must be a real and not an implied service to render that and the subsequent Act, 4 & 5 Wm. 4, c. 82, effectual. It is said that the service here was made in virtue of one of the general orders of May, 1845, No. 33;³ but that order relates to the service of a subpoena, not of a notice of motion. So that even if the Court of Chancery has power to make orders affecting persons in Scotland, the order now made is not one of the kind within its powers, *Lorton v. Kingston*,⁴ where, upon that ground, Lord Cottenham refused to make an order for the service of a copy of the bill under the terms of the 23d order, of the 26th of August, 1841, upon a defendant in Ireland.

Again, the proceeding is defective, for there was no agent to receive service, and consequently there was no good service. The corporation could have no residence here, and there was no agent here to represent it for this purpose. The corporation was Scotch, and could not have an English domicile. The service * 423 therefore was bad, * *Davidson v. The Marchioness of Hastings*,⁵ where the service was held good solely on the ground that there was an English residence. Here there was none.

[LORD ST. LEONARDS. — Your argument would go to show that though the appellants had houses of business in France, they could not be sued there.]

That would depend on the law of France. The term “residence” is wholly inapplicable to a corporation; and here the affidavit of Mr. Brodie shows that the agents in England were agents for sale of goods, and for nothing else. On a mere question whether goods were sold in England by an agent here, service on him who was the company’s agent for the sale of goods might perhaps be sufficient, but not for any other purpose. The case of *Webb v. Salmon*⁶ shows clearly that in order to bind the principal, the agent must be an agent for the particular purpose. In that case, *Hobhouse v. Courtney*,⁷ which had laid down that rule, was

¹ 2 Mylne & K. 32.

² 2 Mylne & K. 289.

³ Toulmin’s Statutes and Orders in Chancery, p. 127.

⁴ 2 Macn. & G. 139.

⁵ 3 Hare, 251.

⁶ 2 Keen, 509.

⁷ 12 Sim. 140.

referred to, and Vice-Chancellor Wigram said he should certainly not carry the rule there stated any further.

It cannot here be said that service on H. Tibbats Stainton can be good service on the company, on account of his being a shareholder of the company, for he himself has never held shares in it; and assuming the deceased Henry Stainton to have been a partner and an agent, the present respondent does not fill either of these characters, being only the executor of his father. At all events, it is a settled rule of practice that such a service as this, even upon an agent, could only be made upon leave granted by the Court, *Whitmore v. Ryan*; ¹ and no leave was obtained here. The service was not therefore in any respect a regular service.

The appellants did not appear * upon this irregular service, * 424 and the Master of the Rolls made an order which shows that he himself doubted about the jurisdiction; he did that which is only done in *ex parte* causes; he gave to the appellants liberty to move on short notice, to dissolve the injunction.

The order was wrong upon the merits. It may be assumed for the purpose of the argument, though it is not in fact admitted, that the corporation here was within the jurisdiction, and further, in the same way, it may be admitted that in an administration suit a Court of equity will, under particular circumstances, restrain a party from instituting a suit in Scotland against the testator's estate. But to authorise the exercise of such a jurisdiction some substantial and independent equity must be established, such as that the objects of the two suits are the same. *Harrison v. Gurney*.² In *Bushby v. Munday*³ the injunction was granted solely because such an equity was established; there is none here. In *Beckford v. Kemble*,⁴ a foreclosure suit had been instituted in Jamaica after a decree here for redemption, and all the parties were resident here; the Vice-Chancellor thought that those circumstances showed a clear equity, which warranted the issuing of the injunction. And *Beauchamp v. The Marquis of Huntley*⁵ was a case where the objects of the two suits being alike, the injunction was granted, but only granted upon terms.

[LORD ST. LEONARDS. — The institution of that suit was necessary in Ireland for the purpose of there giving effect to the order

¹ 4 Hare, 612.

² 2 Jac. & W. 563.

³ 5 Madd. 297.

⁴ 1 Sim. & S. 7.

⁵ Jac. 546.

died domiciled in Ireland, leaving property there and in England, and the same executors in both countries. An Irish judgment was held to have priority, over English simple contract debts, against Irish property remitted to England by the executors, and being here administered. The same principle would no doubt be adopted by the Court in Scotland, and no unjust preference would be given to Scotch creditors. The law of Scotland must prevail in this case. This is a Scotch company; the testator was its agent, and it was his duty to account with the company in Scotland.

In *Wedderburn v. Wedderburn*¹ the plaintiff had obtained a decree in this Court against some defendants who resided and had property in Scotland, and he instituted suits there against them in respect of the same demand which was the subject of the * 428 decree, and he was allowed to * prosecute those suits so as to obtain such security as the Scotch Courts could give for the amount which might ultimately be found due. That is the course which ought to be adopted here, for otherwise the appellants may be entirely defeated by other Scotch creditors, who being in no way whatever subjected to the jurisdiction of the Court of Chancery, may proceed at their pleasure in Scotland to enforce their claims against the estate. There is nothing here to warrant the interference of an English Court of equity.

The Solicitor-General (Sir R. Bethell) and Mr. Anderson (Mr. Lewin with them) for the respondents. — The first principle in this case is, that the law of the domicile of the deceased person ought to regulate all matters touching his succession and the distribution of his moveable effects. The next is, that *actor sequitur forum rei*, and in the lifetime of Stainton the action against him must have been brought here; the third principle is, that the forum of the deceased determines that where his executors shall be sued; and the fourth, that where there has been a judgment pronounced by a Court of competent jurisdiction in the matter discussed, another Court is bound *ex comitate* to give effect to that decision, especially where by its own principles it would have pronounced a similar decree.

There is no reason to make this case an exception to these principles. For all purposes this is an English as well as a Scotch

¹ 4 Mylne & C. 585.

company. Its manufactory is in Scotland, but its chief depots for sale are in England, and there is enough in that respect to bring it within the principle of *Alexander v. Vaughan*,¹ where a Scotchman, who did not reside in England, but came here at different intervals * and traded here, was held liable to the * 429 bankrupt laws. The same principle which governs cases in bankruptcy ought to govern this case ; and Story² shows that the proper place of legal proceeding is to be discovered from the circumstances of each case, but that, as a general rule, the place of business for the sale of goods is to be preferred. *Allen v. Cannon*,³ *The Forth Marine Insurance Company*,⁴ and *Lewis v. Baldwin*,⁵ are to the same effect.

If a man has a house of business for the sale of his goods in Cheapside, and a manufactory ten miles off, there is no doubt that the proper place to serve him would be in Cheapside. The place of business is the proper place of service, whether with an individual or an incorporated company, and a corporation may be subjected to an attachment for disobedience to a mandamus, which has only been served on the town clerk, *The King v. Fowey*.⁶

Then as to the point whether this decree was right on the merits. This is a decree in an administration suit, and is made for the benefit of all the creditors. One of them afterwards steps in, and, to give himself a preference, obtains an inhibition against the lands, and an arrestment against the goods of the debtor. On the principle laid down in *Martin v. Martin*,⁷ that is inequitable, and cannot be permitted. It was upon the consideration that such would be the result here, that the Master of the Rolls⁸ granted this injunction ; he said that if he did not, the English creditors must allow the Carron Company to sweep off the whole of the assets. It does not appear that the inhibition or the arrestment was complete when * this injunction was granted, so * 430 that the inhibition did not give the Scotch company power over the real estate. Inhibition is not properly a proceeding *in rem* ; there must be adjudication. An inhibition resembles what a judgment in this country was before the 1 & 2 Vict. c. 110, gave it the effect of a lien on land. It is a mere legal prohibition

¹ Cowp. 398.² Conf. of Laws, §§ 283, 284.³ 4 B. & Ald. 418.⁴ 9 Beav. 469.⁵ 11 Beav. 153.⁶ 4 Dowl. & R. 132.⁷ 1 Ves. 211.⁸ 16 Beav. 288.

against parting with the lands, but here it is useless, for the lands are not vested by the will alone in the trustees. Under these circumstances the equity for the respondents arises, and that equity is sufficient if the appellants are amenable to the jurisdiction. The cases of *Harrison v. Gurney*¹ (which relates to Ireland), and of *Bushby v. Munday*² (which relates to Scotland), show that they are so. The fact of the appellants residing in Scotland is nothing. If the equity is such that it could be applied to restrain the proceedings in a cause in the Queen's Bench, when they are in England, they can equally be restrained from proceeding in the Court of Session in Scotland.

The principle on which Courts of equity proceed in cases for the administration of assets is stated in the judgment of Lord Redesdale, in *Largan v. Bowen*:³ "Courts of equity will not restrain proceedings of creditors at law against executors, to obtain payment of debts, merely on a bill filed by other creditors, to carry the trusts of the will into execution, until there is a decree; but from the moment of the decree this Court proceeds on the ground that the decree is a judgment in favour of all the creditors, and that all ought to be paid according to their priorities as they then stand." That principle has been applied in the present case, but the Master of the Rolls has reserved leave to apply to the

Scotch Courts a reservation which will satisfy any possibility of particular interest in the heritable estate. In

* 431 Bell's Commentaries⁴ it is shown that the spirit of the law in Scotland is, that every creditor who shall use proper diligence to obtain adjudication shall be entitled to be conjoined in benefit with the rest. That is an answer to the argument of the supposed injustice of this injunction towards the mere Scotch creditors; they could not get priority by suing in the Scotch Court alone while this suit existed in England. The appellant's proceeding in Scotland is therefore unnecessary and vexatious. In *Peters v. Martin*⁵ the Court of Session distinctly recognised this equitable exercise of the authority of an English Court over a domiciled Scotchman, and only proceeded to final judgment because the alleged proceedings in the Court of Chancery seemed to be a mere pretence.

¹ 2 Jac. & W. 563.

² 5 Madd. 297.

³ 1 Sch. & L. 296, 299.

⁴ Bk. 1, ch. 1.

⁵ 4 Shaw & D. 107.

As to what could have been done under arrestment, that was an open question, till the case of *The Globe Insurance Company v. Mackenzie*,¹ which decided that arrestment would give the arresting creditor a preference over those who had only cited the debtor; but at this moment the Scotch Courts would not allow any creditors there to carry off the whole of the property of the deceased after a special decree made in relation to it by a Court of competent jurisdiction in this country.

In cases of this sort the accounts must be taken in the country where the executor is resident. The Scotch Courts have themselves adopted that doctrine, *Young v. Barclay*,² where the Scotch Court did what the English Court has done here, namely, restrain parties from proceeding in a foreign Court, the Courts in Canada. *Hutchison v. The Aberdeen Banking Company*³ recognised a payment made to the English representatives of a Scotchman domiciled * here, as made to the proper forum of distribu- * 432 tion. All these cases show that the proper place for the administration of the effects of the deceased is the country in which he was resident and died. The passages referred to in Story⁴ do not contradict this doctrine. On the contrary, they sustain it. The doctrine of the American Courts is well explained in *Dawes v. Head*,⁵ by C. J. Parker, who says: "We cannot think that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its Courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts"; and the English bankrupt law, which gives a general distribution to foreigners as well as subjects, is referred to with approval. That case, among others, is quoted by Story, in a note, in which he says: ⁶ "An exception to the general rule grows out of the duty of every government and its Courts to protect its own citizens in the enjoyment of their property and the recovery of their debts, so far as this may be done without violating the equal rights of creditors living in a foreign country." There the case considered

¹ 7 Bell's App. Cas. 296.

² 8 Bell & Mur. N. S. 774.

³ 15 Dunl. & Bell (continuation of Shaw & Dunlop's series), 1100.

⁴ Conf. Laws, § 512.

⁵ Conf. Laws, § 513, note.

⁶ 3 Pick. 128, 145.

is one where there has not been a form of an administration and a judgment equally to administer ; but where there had been administration granted by a competent Court, the judgment shows that by that Court the affairs ought to be administered, any claimant, of whatever nation, being freely allowed to prove his claim. That just purpose would be defeated here by unduly favouring the Scotch creditor. The case of *Preston v. Melville*¹ does not support the argument on the other side. The decision there is accounted

for by the particular circumstances of the case. No such
 * 433 decree * could there have been made, if the new trustees in Scotland could have been appointed original executors, and the House merely decided that they who were neither executors nor personal representatives, but mere trustees, should not take the deeds out of the hands of those who did fill the former character.

[LORD ST. LEONARDS. — Suppose the trustees in Scotland were properly the administrators of the Scotch property, how would that affect your argument ?]

No undue prejudice to any creditor would arise from that circumstance. The Scotch administrator, if the principal, might call on the ancillary English administrator for the fund. The confirmation in Scotland does not create a separate administration. The case of *Thompson v. The Lord Advocate*² shows that the interpretation put by the other side on *Preston v. Melville* is erroneous ; for if correct, the legacy duty would have been payable according to the law of Scotland ; and at all events it shows that where there are two representations, the principal and the auxiliary, the latter must discharge the duties imposed on it by the former, which is also the doctrine so clearly laid down in *Dawes v. Head*.³ *Jones v. Geddes*⁴ is not in point, because there the Scotch Court had possession of the land, and the bond was an heritable bond charged upon it. Try the case in another manner. Suppose an English creditor not to come in under an administration suit here, but to institute proceedings in a foreign country, this Court would restrain him. Such a person would have been treated as having usurped the office of an executor, and would be held responsible accordingly. In former times the principal executor granted an authority to other persons resident abroad to collect the portions of the

¹ 8 Clark & F. 1.

² 12 Clark & F. 1.

³ 8 Pick. 128 ; see ante.

⁴ 1 Phillips, 724.

estate * which existed where they resided. If a creditor. * 434 here got a judgment here and then went abroad and collected the estate abroad, he would be put into the situation of a voluntary executor, and the Court would make him bring in all thus collected to the account of the general assets. *Clark v. Lord Ormond, Beauchamp v. Huntley*,¹ and *Paxton v. Douglas*.² As to *Wedderburn v. Wedderburn*,³ the permission to proceed in the Scotch Courts was given there because such proceedings were in aid of, and not in opposition to, the proceedings of the Court of Chancery.

[LORD ST. LEONARDS to the Lord Advocate. — I should like to ask you this question: Suppose what you say is the general rule of law should prevail, and suppose the decree here to be reversed, if the assets in Scotland were not sufficient to pay your demand, would your Courts have regard to the rights of English creditors, or would the whole fund be swept away by your demand?]

[THE LORD ADVOCATE. — That would depend on the form of the proceeding. If the Carron Company got preference, and the assets were insufficient, the Company would take all.]

[LORD ST. LEONARDS. — That is an answer, in fact. Then the question comes to this, if the proceedings in Scotland go on, would there not in effect be two administrations?]

[THE LORD ADVOCATE. — There is no right on any such account to inhibit the Company in a race of diligence.]

[LORD ST. LEONARDS. — As you regard the claim by diligence, then, unless all the creditors go to Scotland to pursue the Scotch property, the Company might run away with all the assets.]

[THE LORD ADVOCATE. — These matters could not be equalized but by a bankruptcy; but suppose the Company * did not obtain a preference, another creditor might * 435 come in, and by obtaining a preference cut out the Company.]

THE LORD ADVOCATE, in reply. — The proper forum is not necessarily that of the domicile. Suppose the case of a man domiciled and dying here, but with all his property in France, and with executors in Scotland, is the administration of that property to take place here alone? the executors would not come here, but go to France

¹ Jac. 546.

² 4 Mylne & C. 585.

³ 8 Ves. 520.

as I shall show on a distinct ground, I do not rely upon that view of the case.

No direct authority was cited to show that the Company was or was not to be deemed within the jurisdiction. But cases were referred to which have a considerable bearing on the question. In *Davidson v. Lady Hastings*,¹ it appeared that Lady Hastings was domiciled in Scotland, and meant permanently to reside there; but she had a house in London, and service at that house was deemed good service, without prior leave being obtained for that purpose, it being deemed unnecessary, as the notice reached her. Now there is some analogy between the cases. There was a domicile in Scotland, a house in London for business, a service here, at that house, and the notice served actually reached the party. In *Lewis v. Baldwin*,² the business of an Irish railway company was carried on in Ireland, and fourteen directors out of fifteen were resident there, yet, upon a question of amalgamation, an order here, giving leave to serve the company in Ireland with a subpoena, was held to be valid. So *In re Madrid and Valencia Railway Company*,³ the railway was in Spain, and the affairs of the company were to be conducted by directors in London and a committee in Madrid, and the Vice-Chancellor treated it as a case subject to English law, or at least as not exclusively subject to Spanish law, and his opinion was confirmed by that of the Lord Chancellor. And, in like manner, the affairs of the Forth Marine Insurance Company⁴ were wound up in this country after bankruptcy. The remedy against a corporation is by *distringas*,
 * 452 and therefore you can bind the Company by operating on its property here, just as in common cases you bind parties by operating against their persons.

Besides these grounds, in favour of the jurisdiction, it appears to me that the Company has submitted to the jurisdiction. For, instead of making a conditional or special submission to the jurisdiction of the Court here, the appellants gave notice that they should move to have the order for the injunction discharged, or that they might be at liberty to proceed in their action in Scotland, so far only as might be necessary for the purpose of having their claim adjudicated by the Court of Session, and for obtaining security for their demand. They appear, therefore, to have sub-

¹ 2 Keen, 509.

² 2 Macn. & G. 169, 3 De G. & S. 127.

³ 11 Beav. 153.

⁴ 9 Beav. 469.

mitted in the alternative to take a limited order from the Court of Chancery. It is hardly necessary to observe that the service was proved in both Scotland and England, and was admitted by the appellants; and I have already shown that the want of previous leave to serve is immaterial, as the notice actually reached them.

If, then, the Company is to be treated as within the jurisdiction, and to have been properly served, we have still to consider the principal question, viz. whether the Court of Chancery had jurisdiction to stay the proceedings of a creditor in Scotland against the Scotch property; and upon this point I entertain no doubt. The cases, perhaps, admit of classification.

Where the question is not one of priority, but of convenience, for the trial of a disputed right, the Court decides upon the jurisdiction, according to the merits of the case. *Bushby v. Munday*¹ is a good example of this. Bushby had given a bond to Munday, to secure a gambling debt, and Munday assigned the bond to Clowes. He proceeded, in Scotland, against Bushby, who was a Scotchman and proprietor of real estate. Bushby filed a bill here to have * the bond set aside and delivered up. *453 Upon a motion for an injunction to stay the proceedings in Scotland, the counsel asked whether the Court could stop proceedings in Scotland; Sir John Leach answered, "I think it may"; and he ultimately, after an elaborate argument, granted the injunction, because he considered that the validity of the bond could best be tried in this country. He laid it down generally, that where parties, defendants, are resident in England, and brought by subpœna here, this Court has full authority to act upon them personally, with respect to the subject of the suit, as the ends of justice require, and with that view to order them to take, or to omit to take, any steps and proceedings in any other Court of justice, whether in this or in a foreign country. That, I think, is the true rule. But the plaintiff was made to submit to such terms in Scotland as would secure to Clowes the preferable lien, which he might acquire by his suit, on the land there, if he should ultimately establish any demand on the bond. This case was followed by *Lord Portarlington v. Soulbby*,² which also depended upon the validity of a security for a gambling debt; and an action in Ireland, on the security was, upon the merits, enjoined by my noble and learned friend opposite, after a review of the early

¹ 5 Madd. 297.

² 3 Mylne & K. 104.

authorities; and the appeal from the decision of the Vice-Chancellor was dismissed with costs. In these cases there was no conflict between creditors.

In *Kennedy v. Cassillis*,¹ although Lord Eldon, under the circumstances, dissolved the injunction which he had granted, yet he had no doubt about the jurisdiction, and he held that it did not contravene the act of union, which opinion was afterwards adopted by Sir John Leach, and that is now a settled point.

* 454 * So in *Jones v. Geddes*² the Vice-Chancellor had granted an injunction against an heritable bond creditor who was proceeding in Scotland against the assignees in bankruptcy of the obligor, who had real estate in Scotland. The bond was alleged to have been executed for a colourable consideration. Lord Lyndhurst dissolved the injunction upon a simple consideration of the balance of the conveniences and inconveniences of the different courses to be adopted, but he fully recognised the jurisdiction.

The next class of cases in which the power has been without difficulty exercised, is, when the same person has recourse to the two jurisdictions for the same service, as in *Harrison v. Gurney*,³ where trustees for creditors having obtained a decree, two of them were restrained from proceeding with a similar bill in Ireland. And in *Wedderburn v. Wedderburn*,⁴ parties who had in a suit here established their right against the defendants and had obtained an order for an account, afterwards instituted proceedings in Scotland against some of the defendants for the same demand; at the Rolls an injunction was obtained against their proceedings in Scotland, and Lord Chancellor Cottenham thought the order quite right. There could, he said, be no doubt that the general rule precludes parties from proceeding in any other Court for the same purpose for which they are proceeding in this Court, whether the other proceedings are taken in this or any other country. But having regard to the domicile of the parties and the possession by some of real estate in Scotland, the Chancellor, as upon an original motion, allowed the proceedings in Scotland to proceed as far as might be necessary for obtaining security against the property there to answer the demand under the decree here.

* 455 * The last class of cases includes those more directly bearing upon the case now before the House, where a creditor

¹ 2 Swanst. 313.

² 1 Phillips, 724.

³ 2 Jac. & W. 563.

⁴ 4 Mylne & C. 585.

came in under a decree here in an administration suit, and yet proceeded in an action in Scotland, which he had commenced in ignorance of the decree, the Vice-Chancellor enjoined the proceedings in Scotland with costs, an order which was affirmed by Lord Cottenham with costs. The claim of the creditor was still under the consideration of the Master, and it was considered that the creditor was harassing the estate by proceeding against it in Scotland. This was the case of *Graham v. Maxwell*.¹ If a creditor is compelled to come in under a suit here the same principle applies.

In the previous case of *Beauchamp v. Lord Huntley*,² where a creditor, who had a specific charge upon a part of the testator's real estates, came in under a decree in a general administration suit, and then claimed to prove in a creditor's suit, which he had instituted in Ireland, Lord Eldon restrained him from proceeding with the latter suit, and made him pay the costs. The decree here was considered to be consistent with the specific right of the creditors over part of the Irish estate.

But of course questions of Scotch law, for example the right of Scotch estates to be exonerated out of the personal estate, must be decided according to Scotch law, and, if practicable, in a complicated case, by the Courts in Scotland. This is shown by *Elliott v. Lord Minto*.³

Nor will the rule operate to destroy any priority to which, from the nature of his security, a creditor in Scotland or Ireland is entitled against the assets in either country according to the law of the country, although they may come to be distributed here. Therefore, in *Cook v. Gregson*,⁴ when the same *456 persons were executors in England and Ireland, and proved the will in both countries, and the testator was domiciled in Ireland, the executors brought to England considerable property from Ireland; and in a creditor's suit here for administering the testator's estate it was held that a judgment creditor in Ireland was, as against the proceeds of the Irish property, entitled to priority in this suit over simple contract debtors.

The last case to which I shall refer your Lordships is the one so much relied upon at the bar, *Preston v. Lord Melville*.⁵ There

¹ 1 Macn. & G. 71.

² Madd. & Gel. 16.

³ Jac. 546.

⁴ 2 Drewry, 286.

⁵ 16 Shaw & Dunl. 472, 8 Clark & F 1

- was property in that case in Scotland and England, and the same trustees were appointed over both properties, but they renounced. Administration was granted in England to another person, and there was the usual decree in an administration suit here instituted by the administratrix ; the Court of Session appointed new trustees over the property ; and afterwards the Court of Session declared that the English personal estate was to be administered in Scotland, but that was reversed in this House by a declaration that the property in England ought to be administered by the administratrix under the authority of the Ecclesiastical Court here. This left open the question as to the distribution by the Scotch Court of the residue, if there should be any, after payment of the debts here.

That was a case in which the Court in Scotland attempted to operate on an administratrix in England. There was no legal representative of the English property, and it was desired to be transmitted to Scotland for distribution. In the case before your Lordships the same persons have obtained probate both in England and Scotland, and no question arises as to the persons to administer the funds, and the real estate in Scotland will be

*457 represented in the *suit. The question is, whether the suit here, which is for the benefit of the creditors, and of which the appellants will have the benefit, does not, as they are amenable to the jurisdiction, prevent them from availing themselves of any preference over the Scotch portion of the property. The cases abundantly prove that the jurisdiction of the Court here is indisputable to stay unjust or harassing proceedings in Scotland when justice can be administered here. If a creditor here were to attempt, in the like case, to obtain a priority at law, equity would enjoin him and compel him to come in equally with the other creditors. In such a case the jurisdiction is perfect. But it is equally operative as to Scotland when the creditor is within the jurisdiction. This is not a case in which your Lordships are asked to take away any specific right of a creditor against the Scotch estates, or to prevent the priority to which he was entitled at the testator's death, for the respondents simply require equality as between creditors of equal degree. A distinction has been drawn between Scotch and English creditors, but any creditor is at liberty, subject to the power of the English Court, to resort to the Scotch Court, and obtain a security on the estates

there, just as any Scotch creditor may come in under the decree here.

It is, however, objected by the appellants, that questions of Scotch law may arise in this case, to which it may be answered, and so may questions of English law arise if the case is taken to the Scotch Courts. But the main objection, assuming the jurisdiction, was, that if the appellants are restrained, other creditors, who might not be within the jurisdiction of the English Court, might proceed in Scotland. The jurisdiction has, as we have seen, been exercised with prudence, so as to meet the exigencies of each case. The appellants, who are entitled to the benefit of the suit here, cannot be allowed to retain any * advantage over * 458 the other creditors here by resorting to Scotland. But it would, of course, be wrong to restrain them from obtaining such a security on the Scotch estates as will place them at least on a level with other creditors in Scotland, although whatever they thus obtain must be brought into the general assets here for the benefit of all. The Master of the Rolls, I think, intended to provide for this right, although his order does not contain any such proviso. In this respect his order should be amended by adding a declaration that the appellants shall be at liberty to take such steps as they may be advised to secure their debt on the estates there, but subject to account for all the property they shall obtain in or from the Scotch estates, in the suit in the Court of Chancery, as that Court shall direct; and with this declaration the case should be remitted to the Court of Chancery to do therein as may be just.

My Lords, with reference to the concluding remarks of my noble and learned friend opposite, I would take the liberty of observing that there is no question about committing the agent; nor is the jurisdiction here, because the agent is resident here. The jurisdiction, if it exists, is because the appellants are here by their houses of business, and by their agents, just as they are in Scotland by their house of business and their agents. They carried on as great a business here as in Scotland. They manufactured in Scotland and sold in England. What would be the use of manufacturing if they could not sell the goods they manufactured? I have been unable to discover which is the particular residence of this Company. The money of the appellants is made by returns coming from England. They manufacture in Scotland. The members of this corporation do not make the iron; they do

*459 not reside in the house. They are nobody ; in fact, * they are represented by their seller, but they are not, in other respects, persons dealing as individuals. Their business is carried on in London just as much as it is carried on in Scotland. It is not therefore a question of attacking the agent as agent. If the service upon the agent is right, it is because, in respect of their house of business in England, they have a domicile in England. And in respect of their manufactory in Scotland, they have a domicile there. There may be two domiciles and two jurisdictions ; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction, one in Scotland, and one in England, and for the purpose of carrying on their business one is just as much the domicile of the corporation as the other.

My Lords, I have thought it necessary to state to your Lordships the view which I take generally of this case ; and as I differed in opinion, I thought it respectful to my noble and learned friends to place upon paper what I have now read to your Lordships. Of course my opinion will go for nothing, as the decision below will be overruled. But I would submit to my noble and learned friends that the case, in the view which they take of it, cannot be remitted. If the view which I take should prevail, it ought to be remitted ; but as my noble and learned friends are of opinion that the injunction ought not to have been granted they should reverse the order of the Master of the Rolls, and so release the Carron Company from all obligation in respect of the suit.

LORD BROUGHAM. — As to what my noble and learned friend has said about his opinion going for nothing, I must observe that it only goes for nothing as regards the decision, but that otherwise the opinion of my noble and learned friend, especially backed as it is by his very able arguments, must go for a good deal. I
 *460 am very sorry that we * should differ upon the subject ; it is a very important diminution to the value of our judgment.

LORD CHANCELLOR. — The order will be according to the prayer. Discharge the order of the 15th November, 1852, and the 6th of December, 1852. That dissolves the injunction granted by the order of the 15th of November. The costs to be paid by the respondents.

House of Lords' Journals, 11 July, 1855.

MAYOR OF DROGHEDA v. HOLMES.

1855. July 2, 9, 24, 26.

The MAYOR, BURGESSES, &c. of DROGHEDA, . . . *Plaintiffs in error.*
 SARAH OLIVIA HOLMES, Administratrix of }
 JOSEPH HOLMES, deceased, } *Defendant in error.*

Corporation. Leases. "Covenant." "Resolution."

By the 6 & 7 Wm. 4, c. 100 (passed in August, 1836), no conveyance of lands in certain corporations (of which Drogheda was one), was to be made, unless in pursuance of a covenant, contract, or agreement made, or a resolution of the corporation duly entered in the corporate books, before the 16th February, 1836. This provision was continued by successive statutes, and incorporated into the 3 & 4 Vict. c. 108 and c. 109. The Corporation of Drogheda had from time to time passed resolutions as to the granting of leases of the corporate property, and on the 20th April, 1801, passed a resolution (which was duly entered in the corporate books), directing that "the auditors and viewers should on reporting on petitions for the renewals of leases take into consideration the value of the premises, and value the same at the full value between man and man, and that the petitioner so applying shall be then entitled to a renewal," on certain terms therein mentioned, "and that all reports shall hereafter be received at one assembly, and taken into consideration not sooner than the then following quarter assembly." A lease had been granted in 1785 for sixty-one years; in 1841 a petition was presented for its renewal; * the petition was referred to the auditors and viewers, whose report was * 461 presented on the 7th January, 1842, and on the same day a resolution ordering the renewal was passed: —

Held, that this was not a resolution which brought the case within the exceptions in the statute; for it merely bound the corporation to receive the report, and afterwards to consider the propriety of acting upon it. The resolution need not be a contract.

LORD ST. LEONARDS. — This resolution was insufficient, although it might not be necessary that the resolution should be such as would form a binding contract, enforceable in a Court of equity: and further, the resolution, such as it was, had not been complied with, for the lease was granted at the same meeting at which the report of the auditors and viewers was presented.

THIS was an action of ejectment originally brought against Joseph Holmes (now deceased), to recover possession of the lands of Townrath, in the county of Louth, near the town of Drogheda. The declaration was filed 12th May, 1848, and the demise laid on the 22d October, 1846. The defendant pleaded the general issue.

An indenture of lease had been executed by the mayor and al-

dermen of Drogheda, dated 7th November, 1785, by which they demised to William Holmes, then an alderman of the borough, the lands in question, on payment of a fine of 874*l.* 11*s.* 3*d.*, and a rent of 62*l.* 9*s.* 2*d.* The lease was to commence from Michaelmas then last past, and to continue for sixty-one years, which would end at Michaelmas, 1846.

The mayor, aldermen, &c., possessed, under the town charters, the power to manage the corporation property, and from time to time they passed resolutions on the subject. On the 7th October, 1796, a resolution was agreed to, that in future all lands of the corporation should be let for a term of ninety-nine years, one half of the rents to be fined down at twenty years' purchase, and that the houses and building ground in the town and suburbs be let for ninety-nine years, and one half of the rent to be fined down
 * 462 at ten years' purchase. * On the 20th April, 1801, some change was effected by the following resolution being passed: "Resolved unanimously, that it be an instruction from this assembly to the auditors and viewers, on reporting upon petitions for renewal of leases of houses, lands, or other premises, that they shall first take into consideration and value the said premises at the full value between man and man; and that the petitioner so applying shall be then entitled to a renewal of his lease for ninety-nine years at one fourth of the full annual value as a rent, and on paying and fining down another or second fourth, at seventeen years' purchase for lands, and ten years' purchase for houses; always obliging the petitioner for a renewal of a lease of a house or houses, by a special covenant, and any other necessary legal deed, to build or rebuild within five years after the expiration of the term of years in his old lease, under a forfeiture of his new lease or payment of treble rent, as the corporation may think fit; giving it also as a matter of instruction to the auditors and viewers, that they specially report on oath on each particular case, what sum or compensation the petitioner appears to them to be justly entitled to (if any), for the term he proposes to surrender, on obtaining a renewal, and that all reports shall hereafter be received at one assembly, and taken into consideration not sooner than the then following quarter assembly."

On the 18th January, 1828, another resolution was passed, "That no lease be renewed by this corporation until the premises are within five years of expiration."

The lease granted to William Holmes had become vested in Joseph Holmes (the husband of the present respondent), who under the resolution of 1828, presented in October, 1841, a memorial, praying for a renewal of the lease upon the usual terms. On the 8th of October, 1841, the matter was, by resolution, referred to the auditors and viewers, who made * a * 463 report in favour of granting a new lease at the rent of 36*l.* 12*s.* 11*d.*, and on payment of a fine of 706*l.* 10*s.* 11*d.* On the 7th of January, 1842, this report was read, and at once confirmed by a vote in accordance with which, by an indenture of the 15th February, 1842, a lease on these terms was granted to Joseph Holmes for ninety-nine years, to commence as from the 29th September, 1841. On the 25th September, 1845, the corporation served on Joseph Holmes a notice to quit at the termination of the lease of 1785, and when that day (30th September, 1846) arrived, possession was formally demanded. As the demand was not complied with, ejectment was brought. The cause was tried at Louth at the Summer Assizes of 1847, before the late Mr. Justice Burton, when a verdict was entered for the plaintiff, subject to the opinion of the Court of Queen's Bench in Ireland. After argument in that Court, the verdict was entered for the defendant.¹ In Trinity term, 1848, the present action was brought in the Court of Exchequer in Ireland; the cause was tried at Louth at the Summer Assizes of 1848, before Lord Chief Justice Blackburne, when the question was, whether the lease of 15th February, 1842, was or was not valid in law. The counsel for the plaintiff insisted that the lease was not valid under the provisions of the 6 & 7 Wm. 4, c. 100, entitled "An Act to restrain the alienation of corporate property in certain towns in Ireland,"² and of § 12,

¹ 11 Irish Law Rep. 348, nom *Roe d. Mayor, &c. of Drogheda v. Holmes*.

² The first section enacts, that "no conveyance, alienation, settlement, charge, or encumbrance whatsoever, of, out of, or upon, any lands, tenements, or hereditaments, to which any body corporate named in the schedule to this Act annexed" (Drogheda was named in the schedule), "or any persons in trust, &c., now have, or may hereafter acquire any right or title, unless in pursuance of some covenant, or contract, or agreement *bonâ fide* made, or entered into, on or before the 16th February in the present year (1836), by or on behalf of such corporate body, or of some resolution duly entered in the corporate books of such body corporate, on or before the said 16th of February, shall be made or executed by or on behalf of such body corporate before the 1st day of September, 1837."

*464 * of the 3 & 4 Vict. c. 109, which, among other things,
 *465 was * passed "to continue for a limited time,"¹ the former
 Act. The defendant relied on the resolutions passed by the
 corporation, and under them Lord Chief Justice was of opinion
 that the lease was valid, and directed the jury accordingly. His

The 3 & 4 Vict. c. 108 (The Municipal Reform Act for Ireland), § 140, enacts,
 "That it shall not be lawful for any body corporate of any borough named in
 Schedule A." (Drogheda was named in that schedule), "at any time after the
 passing of this Act, to sell, mortgage, or alienate the lands, tenements, and
 hereditaments of the said body corporate, or any part thereof, except in pur-
 suance of some covenant, contract, or agreement *bonâ fide* made or entered into,
 on or before the 20th day of August, 1836, by or on behalf of the body corporate
 of any borough, or of some resolution duly entered in the corporation books of
 such body corporate, on or before the said 20th day of August, or to demise or
 lease, except in pursuance of some covenant, contract, or agreement *bonâ fide*
 made or entered into, on or before the said 20th day of August, by or on behalf
 of such body corporate; or in pursuance of some resolution duly entered in the
 corporation books of such body corporate, on or before the said 20th day of
 August, except in the cases hereinafter mentioned, any lands, tenements, or
 hereditaments of any such body corporate, or any part thereof, or to enter into
 any new contract or agreement, except in the cases hereinafter mentioned for
 demising or leasing the said lands, tenements, and hereditaments, or any part
 thereof, for any term exceeding 31 years from the time when such lease shall be
 made, or if made in pursuance of a previous agreement, then from the time when
 such agreement shall have been entered into"; and there was to be taken a
 reasonable rent without any fine: "Provided that in all cases in which any body
 corporate shall, on the 20th day of August, 1836, have been bound or engaged
 by any covenant or agreement, expressed or implied, or have been enjoined by
 any deed, will, or other document, or have been sanctioned or warranted by
 ancient usage, or by custom or practice, to make any renewal of any lease for
 years, &c. &c., upon the payment of an arbitrary fine, it shall be lawful to renew
 such lease for such term and at such rent, and upon the payment of such fine or
 premium, either certain or arbitrary, and with or without any covenant, for the
 future renewal thereof, as such body corporate could or might have done in case
 this Act had not been passed." This Act came into operation, so far as Drogheda
 was concerned, on the 25th October, 1842.

¹ The 3 & 4 Vict. c. 109, § 12, repeated, with the necessary changes, the material
 words of the 6 & 7 Will. 4, c. 100, down to "the said 16th of February," as above
 quoted, and then proceeded thus: "Shall (except as hereinafter provided) be
 made or executed, by or on behalf of such body corporate, on or before the day
 of the first election of councillors under the " (Irish Municipal Corporation Act,
 3 & 4 Vict. c. 108), "in any borough named in the Schedule A. of that Act"
 (Drogheda was there so named). By the 13th section, the Act was to come into
 operation as to Drogheda and the other boroughs in Schedule A. "on the day
 after the election of a town council under the provisions" of c. 108. (That day
 was the 25th October, 1842.)

direction was excepted to by the plaintiff, and the exceptions were argued in the Court of Exchequer, where judgment was given for the defendant. A writ of error was then brought in the Court of Exchequer Chamber in Ireland, when the judgment was affirmed. The present writ of error was then brought.

The Judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Wightman, Mr. Baron Platt, Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crowder attended.

Mr. Napier (of the Irish bar) and *Mr. Bramwell* for the plaintiffs in error. — The question in this case is, whether the lease of 15th February, 1842, is valid, as made “in pursuance of a resolution duly entered on the corporation books,” before the month of February, 1836; that depends on the construction of the Statutes 6 & 7 Wm. 4, c. 100, and 3 & 4 Vict. c. 108 & c. 109. The object of the first of these statutes was to restrain corporations in the alienation of *corporation property. The *466 others adopted the same principle and expressed it nearly in the same words. In the case of *Parr v. The Attorney-General*,¹ the question of the construction to be given to statutes of this kind was fully considered in this House; all the Lords agreed in that case, that as to corporation property “The Municipal Corporation Act creates a trust for corporation purposes,” and that, except in performance of such trust, the corporation cannot dispose of the corporate property. The Statute 6 & 7 Wm. 4, c. 100, required that no lease should be granted of corporation lands, “unless in pursuance of a covenant, contract, or agreement *bond fide* made before the 16th day of February, 1836, or of some resolution duly entered on the corporate books,” before that day. The resolution meant by the statute must be something which is binding in the particular case, which is equivalent to a contract, and cannot be rescinded, *Marshall v. The Corporation of Queenborough*;² not any thing which merely declares a general intention that is to be afterwards applied to a specific object, nor one which those who made it were at any particular time at liberty to abrogate. A different construction will enable any corporations to defeat the purposes of the Legislature, and to grant, as in this

¹ 8 Clark & F. 409.

² 1 Sim. & S. 520.

case, leases of corporation lands at a rent, and upon fines, very far below their real value, and so to render the public trust ineffectual. It is of public importance that such improvident or corrupt grants should be prevented; there is no discretion vested in the corporation; for where parties have a discretion, they have the power to exercise it indiscreetly. The case of *Taylor v. The Dulwich Hospital*¹ shows that the order of a corporation to make a new lease (and the resolution in this case is no *467 *more) cannot be treated as equivalent as an agreement to make it. *Carter v. The Dean and Chapter of Ely*² goes still further; for that case establishes that an entry of the terms of an agreement in the books of a corporation will not bind the corporation, though signed by the majority of the body. To be enforceable it must be binding upon both parties, *Wilmot v. The Corporation of Coventry*,³ *Vaughton v. Brine*.⁴ A statute like this was construed strictly in *Edge v. Parker*,⁵ even against the assignees of a bankrupt, and they having seized goods of the bankrupt on the premises of a third person, were held not to be within the protection of the 6 Geo. 4, c. 16, as having acted "in pursuance of the statute."

The proper construction of the 6 & 7 Wm. 4, c. 100, leaves no doubt as to the application of these principles; that statute not merely prohibits improper alienation, but any alienation at all from the preceding 16th February till September, 1837. The only qualification on that is where the alienation is in consequence of a previous "covenant, contract, or agreement"; the resolution here does not fall within any one of these descriptions. On the other side, it is contended that this provision must be considered under the 3 & 4 Vict. c. 108, § 140, with reference to any custom in a corporation ordinarily to make renewals. But the general intention of the Legislature does not admit of such a construction; for that intention is to restrain corporations from parting with or encumbering their property, except in respect of something which is obligatory on them in point of law; that was not the case here.

¹ 1 P. Wms. 655.

² 7 Sim. 211.

³ 1 Younge & C. Exch. 518.

⁴ 1 Scott, N. R. 258. But see *Hughes v. Budd*, 8 Dowl. P. C. 478, and *Knight v. Barber*, 16 M. & W. 66.

⁵ 8 B. & C. 697.

The petition for renewal was referred to valuers, who made a report, which * report was confirmed, and on it, and not * 468 on the previous resolution, the renewal lease was granted. Suppose the report of the valuers had recommended a lease for eight years only, and such lease had been granted, that would have been a new lease, and not within the resolution; it is not the less so because the whole report was agreed to.

[LORD ST. LEONARDS. — What is the meaning of the words “and that the petitioner so applying shall be then entitled to a renewal of the lease” ?]

Those words seem rather to refer to an existing practice respecting renewals, than to constitute a binding resolution to grant them. They were meant merely as a recognition of old rights. No by-law or usage can be intended by the words in the statute; if that had been intended it would have been expressed. In the case of *The Attorney-General v. The Corporation of Dublin*¹ a question of this sort came before Lord St. Leonards, who thus expressed his opinion on the meaning of the statute: “The intention of the Legislature in passing the Statute of the 6 & 7 Wm. 4, c. 100, cannot be doubted; it was to prevent corporations from dealing with their property pending the period a reform in the corporation was under the consideration of Parliament, in a way in which they would not have dealt with it if they had not been aware, or at least suspected, that their privileges and their property were about to pass into other hands.” The plaintiffs in error submit that this is the true exposition of the statute. But further, this lease was not only not made “in pursuance of a covenant, contract, or agreement,” or of “a resolution duly entered on the corporate books before the 16th of February,” but was made in contravention of the resolution that was to be found there; so that if that resolution is to be taken as having a binding effect, then the lease is bad. By that * resolution, the * 469 report made “at one assembly” is to be taken into consideration “no sooner than the following quarterly assembly.” Here the report was presented, and the grant of the lease made on the same day. This lease is therefore bad, even supposing the resolution to have the effect of authorising the making of a lease of this kind, and the plaintiffs in error are consequently entitled to judgment.

¹ 1 Drury & War. 554.

Mr. Isaac Butt (of the Irish bar) and *Mr. Hugh Hill* for the defendant in error. — In deciding this case, which entirely depends on the construction of the statutes, it must be borne in mind that before the 6 & 7 Wm. 4, c. 100, there were no definite trusts attached, as at present, to corporate property in Ireland. There was therefore an absolute right of alienation of such property. It was in the same state in Ireland as it had been in this country before the passing of the Municipal Corporation Act. This is a disabling statute, and must so be construed. The resolution of 20th February, 1801, is that under the authority of which this lease is made, and that resolution has been properly carried into effect. The existence of that resolution prevents any one of the statutes from applying to this case. That resolution was duly entered on the corporation books, and had a binding effect on the corporation. Though, under the 3 & 4 Vict. c. 108, § 140, Irish corporations were deprived of the power of making leases for more than thirty-one years, yet that deprivation was subject to the exception of making them in the same manner as they had been made in former times. The question, whether the lease was in pursuance of the agreement, or of the old usage, was the first question which the corporation had to decide. The Non-alienation Act of 1836 did not exclude the operation of any by-law * 470 * or usage of the corporation, and the resolution of 1801 operates here as a by-law, and makes the renewed lease valid. After the passing of the 6 & 7 Wm. 4, c. 100, the case of *The Attorney-General v. The Corporation of Dublin* came before Lord St. Leonards in the Court of Chancery in Ireland, and his Lordship expressed the opinion already referred to;¹ but that very opinion shows that the statute did not affect cases where, before it was passed, the corporation had made a by-law, or had been accustomed to act on a certain usage in granting these renewal leases. What had taken place in this country is to be treated as manifesting the intention of the Legislature in framing the Irish statute. Pending the passing of the English Act, very extensive litigation was going on with a view to upset the alienation of certain property at Liverpool. The case of *The Attorney-General v. The Mayor of Liverpool*² showed that the power to interfere, as in case of breach of trust, arose with that statute.

¹ See ante, p. 468.² 1 Mylne & C. 171.

In *The Attorney-General v. Aspinall*,¹ the power was first directly applied ; and in *The Attorney-General v. Wilson*,² the old power of the Court of Equity to relieve against alienations which were collusive was asserted. In the enacting part of the statute, the word "lease" is not used ; "conveyance, alienation, settlement, charge, or encumbrance," are the words employed ; none such is to be made, unless in pursuance of some covenant ; but there the word "covenant" must mean covenant under seal, and it is plain, from the words employed, that the Legislature had not a lease in contemplation, while even alienations, which were to be made in pursuance of a prior resolution regularly entered on the corporate books, were allowed to be valid.

* Here it is clear, that the sacrifice of five years of the *471 lease, for the purchase of which a large sum of money had been given, entitled the defendant to a renewal ; that renewal being, as it was, sanctioned by the ancient custom and usage of the corporation. There is no necessity whatever for the resolution to be something which amounts to a binding contract ; the resolution constitutes a by-law, and if valid in itself will warrant what is done under it. This Municipal Corporation Act was for this purpose a disabling Act ; it came into operation in Drogheda after the first election of town councillors, and therefore not until the month of October, 1842, which was long after this renewal had been actually granted. That Act therefore did not affect the renewal, which was made in due accordance with the provisions of the 6 & 7 Wm. 4, c. 100, being made in pursuance of a resolution duly entered in the books of the corporation before the 16th of February, 1836.

Mr. Napier replied.

THE LORD CHANCELLOR proposed that the following question should be put to the Judges : —

Whether on the record (as set out in the printed appendix), the plaintiffs were entitled to judgment for an award of *venire de novo* ?

July 9.

MR. BARON PARKE this day delivered the unanimous opinion of the Judges.

¹ 2 Mylne & C. 618.

² 9 Sim. 30.

To the question proposed by your Lordships, we answer, that in our opinion, on the record (as set out in the printed appendix), the plaintiffs were entitled to judgment for an award of a *venire de novo*.

The question altogether depends upon the validity of the lease of the date of the 15th February, 1842, made by the
 * 472 * lessors, the plaintiffs, here, who constitute the corporation of Drogheda, to the defendant.

[His Lordship stated the facts of the case, and the provisions of the statutes, and read the 12th sect. of the 3 & 4 Vict. c. 109.]

There being no covenant, contract, or agreement in this case, the simple question is, whether there was any resolution, within the true meaning of this section, duly entered in the corporate books, before the 16th day of February, 1836?

The only resolution on which any reliance could be placed was that of the 20th April, 1801, which appeared in the books; it was to this effect: —

[His Lordship read it, see ante, p. 462.]

There were two other resolutions of January, 1828, and October, 1841; then an entry of the report of the auditors and viewers of the 7th January, 1842, and the resolution of the same date granting the lease in question.

The Lord Chief Justice directed the jury, that having regard to the several resolutions, the defendant's memorial, and the proceedings thereon given in evidence, the lease of 1842 was made in pursuance of a resolution or resolutions duly entered in the books of the corporation of Drogheda before the 16th of February, 1836, and that the lease was therefore valid in law, and the defendant entitled to a verdict. The counsel for the plaintiffs excepted to this direction, and the jury found a verdict for the defendant. The question your Lordships propose is, as to the validity of this exception. Our opinion is that it is well founded, and that a *venire de novo* ought to be awarded. We all think that in this case there was no such resolution given in evidence, as to satisfy the words of the statute.

The restrictive enactments of the Statutes 6 & 7 Wm. 4, and 3 & 4 Vict. c. 108 & c. 109, were clearly for the purpose
 * 473 * of disabling corporations from dealing with their property in a different manner from that which they would have done, if they had not been aware that it would probably pass into

other hands, as stated by the Lord Chancellor Sugden, in the case of *Attorney-General v. The Corporation of Dublin*.¹ But the Legislature thought that there might safely be excepted from the general prohibition grants in pursuance of a covenant or agreement *bond fide* made before a prior day, when corporations would probably have entertained no expectation of being deprived of their property, and made, not merely when they were under a binding contract to convey, but even where they had bound themselves definitively, by a resolution entered in their corporate books, to make a grant or lease; such a resolution as was final and complete, and required no further consideration or deliberation on their part, and which would constitute an agreement enforceable in equity if communicated to and acted upon by another, and expense incurred, according to the principle laid down by Sir John Leach, in *Marshall v. The Corporation of Queenborough*,² or even a resolution, though not enforceable in equity, such as was come to by the corporation of Coventry, and entered in the corporation books in the case of *Wilmot v. The Corporation of Coventry*.³ But we think that at all events it must be a resolution showing a clear and definite intention to grant a lease on certain definite terms.

If the resolution is of that character, we do not go so far as to say that it must be one for granting a lease to one particular individual; it may be to grant leases to several different persons by one resolution, or to a defined class, as to all freemen of a certain standing; but it must *be a resolution final in *474 itself, and which requires no further consideration before the corporation shall determine to adopt it or not. If such a resolution could be open to further consideration after the 16th February, 1836, a subsequently completed resolution might be open to the suspicion of being unduly and improperly made.

Now the resolution of April, 1801, is by no means a complete resolution. It is made in favour of freemen, but with respect to all it is not final, but deliberative. It leaves it open for the corporation in each case, when the grant of a lease was asked for, to consider the valuation made by the valuers, and the character of the proposed lessee, and to reject the petition if they did not approve of either. Whether that part of the resolution of 1801, that reports received at one assembly could not be taken into con-

¹ 1 Drury & War. 554.

² 1 Younge & C. Exch. 518.

³ 1 Sim. & S. 520.

sideration at that assembly, still continued in force, or was tacitly repealed, we need not inquire, because whether it was or not, we think the resolution of 1801 was not such as the statute requires, and the resolution of 7th January, 1842, and the lease of the 15th February, 1842, not being founded on a sufficient resolution duly entered in the corporation books before February, 1836, are void.

It also appears to us that so long as the resolution continued unrepealed, not to renew until within five years of the expiration of the existing lease, no resolution to renew this lease could have been made before February, 1836, because the last five years of the former lease of 1785 did not begin till Michaelmas, 1840.

It may be proper to observe, that section 13 of the Statute 3 & 4 Vict. c. 109, which enacts that that Act shall come into operation in (amongst other boroughs) Drogheda on the day after the election of a town council, under the provisions of that *475 Act, never could have intended to delay * the operation of section 12 till that period ; it must refer to the other parts of the Act. We consider section 12 to have been in force before that period, and the question on that section is that which we have stated.

We are of opinion that there was no resolution such as the statute requires existing in this case, that the direction of the Lord Chief Justice was wrong, and that there ought to be an award of a *venire de novo*.

Our opinion, if your Lordships should act upon it, by giving judgment for the plaintiffs in error, will not preclude the representatives of the original defendant from hereafter applying to and obtaining from the new corporation another lease under the 3 & 4 Vict. c. 108, § 140, if the lessee was in the position of a person as to whom the corporation was sanctioned or warranted, by ancient usage, or by custom or practice, to make a renewal of his lease, within the meaning of that clause.

July 24.

THE LORD CHANCELLOR. — My Lords, in this case, I have merely to call your Lordships' attention to the opinion which has been delivered by the learned Judges through Mr. Baron Parke, and which I confess seems to me to exhaust the subject. [His Lordship stated very fully the circumstances of the case.] The defence arising on the grant of the new lease would undoubtedly be a good

defence to the action of ejectment, if the corporation had power to make that new lease.

Whether the mayor and burgesses had such a power, depends upon the particular provisions of the Irish Municipal Corporation Act, the 3 & 4 Vict. c. 108. The two sections of that statute are sections 139 and 140. By those sections, corporations in Ireland were restrained from selling, or, except under certain restrictions, leasing their property. The corporate property is in truth made trust *property applicable to public purposes. That *476 is just the same in Ireland as it is in England. That Act came into operation, as far as Drogheda is concerned, on the 25th October, 1842; that is, not until after the new lease had been granted to Holmes in February, 1842.

Therefore it would seem, looking to that Act alone, that there could be nothing in that Act which would prevent the corporation from granting in February, 1842, the lease which might have been granted if that Act had not been passed. But by another Act passed in the same session, indeed the very next chapter, the 3 & 4 Vict. c. 109, continuing certain enactments which had been made from time to time since the year 1836, it was provided that it should not be lawful for corporations to make new leases that they were not bound to make by virtue of some contract previously entered into, or in pursuance of some resolution duly entered in their corporate books. That enactment was in truth only a continuation of a prior enactment which had been made in 1836, and which had been continued from time to time, so that from the time that the altered state of municipal corporations was contemplated, up to the time when those bodies in their altered state were reformed, and came into their present state of existence, the Irish corporations were restrained from disposing of their property.

The 12th section of that statute (c. 109) is one to which I must direct your Lordships' attention. [His Lordship read it, see ante p. 465, n.] Now, it was not contended that there was here any contract or covenant which would enable the corporation, in opposition to that general enactment, to make the lease in question. But it was said that there was a resolution duly entered in the corporate books, under which it was competent to the corporation to make the lease, which in fact was made. The resolution mainly *relied upon was that which was passed on *477

the 20th of April, 1801. [His Lordship read it; see ante, p. 462.]

The effect of that resolution was, that when an application was made for a renewed lease, it should be referred to certain auditors and viewers to examine into the matter. They were to make their report, and certain times were to be fixed, upon which, according to the resolution, renewed leases might be granted, the mayor and aldermen not, however, binding themselves to make the grant, as is obvious from this circumstance, that the auditors were to make a report, and that report was to be taken into consideration by the corporation at the following quarterly meeting.

A subsequent entry was also relied upon at the trial, a resolution of the 18th of January, 1828, but it is not very material. It is merely a resolution, that no lease should ever be renewed of which there was more than five years to run. In point of fact, the holder of this sixty-one years' lease, when there was less than five years to run, made a surrender of the lease, and a new lease was granted to him. As far, therefore, as that resolution is concerned, he duly complied with it.

But the question is, whether or not this resolution of the 20th of April, 1801, was a resolution within the meaning of that clause, which enabled a corporation to grant a valid lease, notwithstanding the prohibition that had been in force from 1836 downwards.

When this question was argued, upon which in truth the case entirely depends, we had the assistance of the learned Judges. The case was fully considered by them, and they gave an opinion in which I believe all your Lordships concurred. The noble and learned Lord, Lord St. Leonards, not now in his place, has authorised me to say that he takes the same view as that which was taken

by the learned Judges, that that is not a resolution within
 * 478 the meaning of * that section of the Act, and for this reason, when it is said that the corporations might grant a new lease, if it was in pursuance of a contract, or covenant, or resolution duly entered in the corporation books, the meaning must have been a contract, or a covenant, or a resolution, so far *ejusdem generis*, that it was upon certain defined terms, both as to rent and holding, and not a mere resolution, not binding themselves to more than that they would receive some report upon the subject, and consider afterwards the propriety or impropriety of acting upon such report. That was the view that was taken by the learned

Judges, and inasmuch as we have the benefit of their opinions, stated with very great clearness, which opinions have been printed, I think I am best discharging my duty by simply saying, that I entirely concur in and adopt the reasoning of the learned Judges, the result of which is, that the exceptions to the learned Lord Chief Justice's decisions were properly taken, and that consequently the plaintiff in error is entitled to judgment, and that there ought to be a writ of *venire de novo*.

LORD BROUGHAM. — My Lords, I have no doubt whatever that we ought to adopt the opinion of my noble and learned friend as to the course to be taken in this case. We, none of us, after the first stage of the argument, had any doubt upon this subject. Some little hesitation was felt at first, considering the authority upon which the case came recommended to us from Ireland. But in the course of the argument, even before we had the benefit of the opinion of the learned Judges, I believe all three of us, my noble and learned friend on the Woolsack, my noble and learned friend now absent, and myself, had come to an opinion coinciding exactly with that which the learned Judges have given ;

* I have therefore no hesitation whatever in seconding my *479 noble and learned friend's proposition, that there should be a *venire de novo* in this case.

Judgment for plaintiff in error awarding a venire de novo.

July 26.

LORD ST. LEONARDS. — Before we proceed to dispose of the case in the paper for this day, I wish to make a single observation upon a judgment that was given by my noble and learned friend on the Woolsack, with my concurrence, during my absence on Tuesday last, in the case of *The Mayor and Burgesses of Drogheda v. Holmes*. I wish to make an observation in order to guard myself against being supposed to be of opinion that under the Act of Parliament it was necessary that the resolution referred to should form a binding contract which could be enforced by a Court of equity. I did not concur with that argument of the counsel for the plaintiffs in error, although I concurred with my noble and learned friend in the opinion that there ought to be a *venire de novo*. One ground that I principally relied upon was, one on which the learned Judges did not give any opinion. They say, "Whether that part of the

resolution of 1801, that reports received at one assembly could not be taken into consideration at that assembly, still continued in force, or was tacitly repealed, we need not inquire, because, whether it was or not, the resolution of 1801 was not such as the statute requires, and the resolution of 7th January, 1842, and the lease of the 15th of February, 1842, not being founded on a sufficient resolution duly entered in the corporation books before February, 1836, are void."

Now, my Lords, I have been mainly influenced, in coming to the opinion at which I have arrived in this case, by a regard
 * 480 to that point upon which the learned Judges here * did not give any opinion. The resolution of 1801 required that the report of the auditors should be received at one assembly, and taken into consideration not sooner than at the following quarterly assembly. That was an excellent check against any attempt of any member of the corporation to obtain improperly and unduly a lease of corporation property. The report in question was received and acted upon at the same meeting, directly contrary to this resolution, upon which alone the validity of the lease depended. I do not think that the mere contravention of the rule can be considered as a ground for supposing it to be repealed; nothing of that sort appears upon the face of the corporation books. I am mainly influenced, therefore, in the opinion which I have arrived at in this case by that circumstance.

My Lords, I was anxious not to be misunderstood in this case, because when all the Judges of Ireland were of opinion one way, and all the Judges of England, unfortunately, were of opinion the other way, there must be a very great difference of opinion, and I think it due to the Judges of Ireland, for whom of course I entertain a high respect, to explain the grounds upon which I concurred in the view taken by the Judges of this country.

THE LORD CHANCELLOR. — I will just add upon the subject of this case, that certainly, speaking for myself, and I think I may also say for my noble and learned friend now absent (Lord Brougham), we did not mean to express any opinion that there must be an absolute binding resolution, in truth amounting to a contract. On the contrary, we said, that there need not be a contract, but that the resolution should be such as to show definitively what the terms were which we thought did not appear in

the case. I am far from saying that my *noble and learned *481 friend's view about the necessity of postponing the consideration to an adjourned subsequent meeting, is not perfectly correct, and the learned Judges cautiously say that they do not in the least mean to express any opinion to the contrary. It was not necessary for them, nor for such of your Lordships as were present, to give an opinion upon that subject, inasmuch as the learned Judges in giving their opinion, and your Lordships in giving yours upon Tuesday last, thought that there were grounds for your judgment, independently of that, and that therefore no opinion need be given upon that subject.

Lords' Journals, 24th July, 1855.

LARPENT v. BIBBY.

1855. June 29; July 9, 23.

SIR G. LARPENT AND G. NOBLE, *Plaintiffs in error.*

JOHN BIBBY AND JAMES J. BIBBY, *Defendants in error.*

Bankruptcy. Deed of Arrangement. Reserve. 12 & 13 Vict. c. 106.

A deed of arrangement, though executed by six sevenths in number and value of the creditors of an insolvent estate, will not be binding on the rest, if executed so as to be capable of being carried into effect before the passing of the Act 12 & 13 Vict. c. 106.

Quære. Whether such a deed to be valid within the statute must provide for the complete distribution of the insolvent's estate and effects without any reservation whatever?

It seems that it is void if it only provides for such distribution among those creditors who are parties to it.

ASSUMPSIT by Bibby and another, as indorsees against Larpent and another, as acceptors of a bill of exchange for 1500*l.*, payable at six months after sight, drawn at Calcutta, on the 27th May, 1847, by Cockerell & Co. on the defendants, accepted by them, and indorsed by Cockerell & Co. to the plaintiffs. The defendants pleaded that they and Cockerell & Co. were partners, and that the *bill was accepted by them, and Cockerell and *482

where jointly or account of their copartnership business, and was interested to the plaintiffs before it became due, and that they had always held the same; and the defendants alleged that the partnership of Cockerell, Larpent, & Co. had become liable to the bankrupt laws, and that on the 17th November, 1847, the defendants and Cockerell & Co. were indebted to the parties to the deed thereafter mentioned, and were unable to pay their said debts, and that before the taking effect of the Bankrupt Law Consolidation Act of 1849 [the 11th October in that year], to wit, on the 27th October, 1847, Cockerell, Larpent, & Co. suspended payment, and thereupon a meeting of creditors was held, and by an indenture made by Cockerell, Larpent, & Co. of the first part, Gregson and others of the second part, and certain creditors of the defendants of the third part, after reciting, &c. The plea then set out the deed, by which, among other things, it was agreed as follows: that the affairs of the partnership should be placed under the direction of inspectors; that a dividend should be paid as soon as funds could be realized; that 5000*l.* should be employed in the discharge of small claims, in the discretion of the partners, and sanctioned by the inspectors; that the partners had respectively agreed that "their respective private estates, excepting only their household gear and furniture, plate, books, linen, china, household stores, and like articles of domestic use, and the wearing apparel and paraphernalia of themselves, their respective wives and children, should be available for the purposes of the indenture, "subject to the payment of their respective private debts"; and it was witnessed that each of the parties of the first part agreed to give the best assistance to the inspectors, and would render accounts,

and that they would not, except as allowed by the inspectors, do (otherwise than by legal *compulsion) any act

whereby any creditor might obtain any preference over any other, and that each of the parties of the first part would collect all his private effects (save the articles thereinbefore excepted), and would discharge all his private debts, and apply the surplus amongst the joint creditors: "Provided that the said parties of the first part should, in consideration of devoting themselves to the winding up of their partnership affairs, and whilst so devoting themselves, be entitled, during the first year, ending 27th September, 1848, to receive and retain out of the monies belonging to their copartnership estate, 8000*l.*," to be apportioned among them

by the inspectors, and after the first year such a sum of money as should be certified by the inspectors. And it was provided that the monies to be so collected should be divisible in the first instance amongst the creditors "in March next [1848], so far as such funds should have been then realized, and should afterwards from time to time be divisible amongst, and should be paid to, the creditors as often as there should be sufficient in hand to pay five per cent. on their several debts, until the creditors should have received 20s. in the pound, or the said monies, or such part thereof as should be accepted by way of final dividend, should be exhausted; provided that if any creditor should not have had reasonable time to declare his assent to, or dissent from, the present arrangement, and to execute these presents at the time when any dividend should have been declared payable, then the dividend of every such creditor should be reserved until he should have had reasonable time "to assent and to execute; "and in case he should assent and execute within such reasonable time, then he should thereupon become entitled to such dividends so reserved. Nevertheless, no dividend should be reserved to any creditor after he had had reasonable time or had so refused." And further, * that in case the time should elapse during which it was * 484 agreed that any dividend should be reserved, and the creditor on whose account the same was so reserved should not have executed these presents or assented to the arrangement, then every such dividend should sink into the common fund, and be distributable with the other monies amongst the creditors who should have executed these presents; provided, that if any creditor other than one entitled to such reserved dividend should execute the deed after a dividend had been paid, he should thereby become entitled to an equal dividend with those who had first executed, and should be paid out of the first monies thereafter realized, and before any further dividend was paid to the others, but there should be no refunding of any dividend. And it was agreed, "that the said assets should be payable and distributable to and amongst all such of the creditors as should have executed those presents or assented to the arrangement thereby made, in such and the same manner as the same would be payable and distributable, and the same rights and equities should prevail and govern amongst the said creditors in respect of their said debts, and between the said creditors and the parties thereto of the first part, as if a fiat in

bankruptcy had been issued on the 18th of October, 1847," and as if the respective debts had been duly proved under the fiat on that day. It was then provided that on the execution of this deed the creditors should release the debtors from all actions whatsoever, and in case any creditor should fail to observe that covenant, his debt should be absolutely forfeited. Nothing therein was to extend to prevent any creditor from enforcing any "mortgage, claim, charge, or lien" against third parties on bill bonds, &c.

The plea then alleged that the indenture being so signed as aforesaid, the inspectors did appoint the 30th of June, * 485 * 1849, as the day from which it should operate as a release; and they afterwards appointed other days, the last of which was the 31st December, 1850, and that before that day, namely, on the 11th October, 1849, the statute (11 & 12 Vict. c. 106) came into operation, and the indenture was at that time a deed of arrangement between the defendants and their creditors within the meaning of the provisions of the Act. And that after the Act so came into operation, the deed "was signed and sealed by divers (to wit, one hundred and eighty) creditors, who together with divers (to wit, one hundred and eighty) creditors who in like manner had signed and sealed the indenture previously, amounted in the whole to a large number (to wit, six sevenths in number and value) of the creditors of the defendants, Cockerell & Co., within the meaning of the provisions of the said Act, whose debts amounted to 10*l.* and upwards, after allowing the value of mortgaged property, or liens, &c.; and that the plaintiffs were at the time of making the deed, and until the commencement of this suit, creditors within the meaning of the Act, and that after the suspension of payment (to wit, on the 31st January, 1850), the plaintiffs had notice of the said suspension of payment and of the said deed of arrangement, and that three calendar months from the time of the notice had elapsed before the commencement of the suit.

The plaintiffs demurred to this plea, and the following were the points stated for argument: that the deed was not a deed of arrangement within the Bankrupt Consolidation Act of * 486 1849;¹ that it was not shown with certainty * that the deed

¹ 12 & 13 Vict. c. 106, §§ 224 to 231 inclusive, were referred to, but the question chiefly turned on § 224, which is in the following terms: "That every deed or memorandum of arrangement now or hereafter entered into between such trader and his creditors, and signed by or on behalf of six sevenths in number and value

had been signed by six sevenths in number and value of the creditors; that it did not appear that the plaintiffs had notice of the deed so signed; that the number and value of the creditors ought not to have been stated under a *videlicet*; that it was not stated that the deed was so signed by the creditors before the plaintiffs had notice of the same; that it was uncertain when the names were affixed, and whether they were so affixed before or after the plaintiffs had notice of the deed.

On this demurrer, judgment was given for the plaintiffs on the 10th November, 1852 (see 1 Ell. & Bl. 551, n. b). A writ of error was brought, and the judgment was affirmed in the Court of Exchequer Chamber, on the 21st April, 1853. The present writ of error was then brought.

The Judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. Baron Platt, Mr. Justice Williams, Mr. Justice Crompton, and Mr. Justice Crowder, attended.

* *Sir F. Thesiger* and *Mr. Bramwell* (*Mr. M. Smith* and *487 *Mr. Willes* were with them) for the plaintiffs in error.¹—

The objections to the validity of the deed are, first, that the re-

of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matter having reference thereto, shall (subject to the conditions herein-after mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy: provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 228th section provides that the creditors of every such trader shall have the same rights respectively as to set off mutual credit loan and priority, and that joint and separate assets shall be distributed in like manner as in bankruptcy.

¹ By direction of their Lordships, the argument was in the first instance confined to the question, whether the deed executed in this case was a deed within the provisions of the statute. The points of form raised by the demurrer had only been partly argued when this direction was given, and no question upon them was put to the Judges.

quired number of creditors having signed it before the passing of the Bankrupt Law Consolidation Act, it must be taken as then completed, and it might have been carried into effect before the statute, and so was not within its provisions; and next, that it is invalid for not providing for the distribution of all the debtor's property among the creditors. The first objection is not tenable; with reference to this particular case. *Waugh v. Middleton*¹ will be cited, but does not sustain the objection. That case decided that the statute does not operate upon such instruments as were entered into and completed before the passing of the statute, but it also decided that the statute does apply to such as were entered into before and were inchoate at the time of the passing of the Act. It is the latter part of the decision which is alone applicable to the present case. The deed here was inchoate at the time of the passing of the Act; it must be so considered till the day when the inspectors certified, under the 226th section of the statute, that the deed had been duly signed. Now the inspectors did not certify that this deed was to operate as a release till the 31st December, 1850. Up to that time, therefore, the deed was an inchoate deed, and that being subsequent to the passing of the statute, the provisions of the statute must be considered to take effect on the deed.

* 488 * Then as to the question, whether this deed is invalid in not having provided for the distribution of the whole of the trader's estate? In *Drew v. Collins*,² the Court of Exchequer held such a deed to be bad, for want of such a provision; but in *Tetley v. Taylor*,³ the Court of Queen's Bench, with the full knowledge of the decision in *Drew v. Collins*, decided differently. There was, therefore, a conflict of opinion between the two Courts, but the decision of the Court of Queen's Bench was taken to the Court of Exchequer Chamber, where it was reversed.⁴ That reversal was followed by *Cooper v. Thornton*,⁵ where the Court of Queen's Bench, acting, as of course, on the decision in the Court of Exchequer Chamber, held that though the deed in the first instance conveyed the debtor's whole estate, yet if it empowered the trustees to give back a portion of that estate, it was void as to the non-subscribing creditors. Then came *Fisher v. Bell*,⁶ which was in

¹ 8 Exch. 352.⁴ 1 Ellis & B. 532.² 6 Exch. 670.⁵ 1 Ellis & B. 544.³ 1 Ellis & B. 521.⁶ 12 C. B. 363.

like manner decided on the judgment of the Exchequer Chamber, in *Tetley v. Taylor*; and, finally, there came the present case,¹ where that judgment was also followed and without argument; so that, in fact, all decisions rest on the single authority of the Court of Exchequer Chamber in *Tetley v. Taylor*. Now, the construction of this statute was very fully considered by the Court of Common Pleas in *Phillips v. Surridge*,² and no objection of this kind was there taken. Indeed, it is clear from the language of Lord Chief Justice Wilde in that case, that no particular terms of arrangement are required by the statute, but that it was the intention of the Legislature "to give the largest discretion to the creditors, * and the mode by which it secures the interests of * 489 those who do not execute is, by intrusting them to the care of the creditors who do." * Mr. Justice Maule took the same view of the question. Here six sevenths of the creditors have agreed to the terms of this arrangement, and their assent makes the deed valid. The creditors are the only persons to be consulted as to the best means of collecting the assets, and if they think that certain persons, the traders for instance, ought to be employed for that purpose, they may determine to employ those persons, who, on their part, will be entitled to remuneration for their labour, and there can be no remuneration given except out of the funds of the estate. The provision for the payment of these services cannot be truly said to be an exception of any part of the property from the operation of the deed and from liability to distribution; it is merely a provision to pay for a very necessary and it may be a very advantageous labour, and this deed does not leave the amount of that payment at large, but restricts it to a certain sum. This deed does provide in terms for the payment of all the debts and for the application of the whole estate to effect that purpose. It is therefore a deed which entirely satisfies the provisions of the statute. The only conditions to be observed in framing such a deed are those contained in the 225th section, and even they can hardly be called conditions, and are only applicable to deeds of the nature therein particularly specified.

It is said that in the 228th section, there is a provision that "the joint and separate assets shall be distributed in like manner as in bankruptcy," and that that means that there shall be a distribution

¹ 1 Ellis & B. 551, note.

² 1 Lowndes, M. & P. 472.

³ 1 Lowndes, M. & P. 458

of all the effects as in bankruptcy, and that there shall be no exception or reserve on any ground whatever. Its true meaning certainly is not *that. The real intention was that deeds of arrangement should in future be founded on the principle of distribution in bankruptcy; but that does not prevent a fair allowance to the person who arranges the business of the estate, even if that person should be the insolvent trader himself. What is done in bankruptcy is not meant to give the only valid form in which a deed of arrangement can ever be made. The general object of the statute was, that deeds of arrangement should be binding on all the creditors if made with the consent of six sevenths in number and value of those creditors; and having taken that precaution to prevent undue and improper arrangements, the Legislature left details of arrangements to the creditors themselves. It is clear that the rules of bankruptcy do not furnish the sole test and standard of what these details may be, though they may in some particular instances, as in those of servants, control the provisions of an arrangement. The meaning of the 228th section as to joint and separate assets is, that, as a rule, joint assets shall be distributed among joint creditors, and separate assets among separate creditors; but even as to that, there is no absolute prohibition of a special arrangement voluntarily made by the two sets of creditors.

Sir F. Kelly and Mr. Serjeant Channell (Mr. W. Paterson was with them) for the defendants in error. — When the peculiar form of this deed is considered, it will be seen that the question, what the statute requires, does not arise here. The statute is totally inapplicable to this particular deed. If, being executed by six sevenths, it was binding on the other creditors, the latter would be compellable to release and discharge the debtor; but that cannot be so, for the creditors who have not signed will not be *491 entitled, by the statute, to a shilling under the deed, *for the whole of the estate may be paid away for the benefit of the creditors who, before the Act, have executed the deed, and there would be no means of recovering back any part of the dividend. By the deed itself there is an express provision against refunding money paid under it. Other consequences would follow in other respects, for the deed was framed before the Act was passed, and it is impossible to make the two consistent with each

other. In one part of the deed it is provided that if the inspectors should certify that there had been a default of the debtors in the performance of the deed, or if a fiat in bankruptcy should issue against the debtors, or if a sufficient number of creditors should not execute the deed, it is to be declared void ; but if that did not happen, then the inspectors would have the power to declare the day on which the deed is to become operative as a release to the debtor, his person and estate ; and this power they might exercise at any time before the 31st December, 1848 ; and they did exercise this power at first by appointing the 30th June, 1849, which was before the Act was passed ; but they afterwards altered that to the 31st December, 1850. It has been supposed that the fact of the inspectors doing this showed that the deed was not a deed completed before the passing of the statute ; but that will be seen not to be so, if the provisions of the deed with regard to dividends among the creditors are properly considered.

The date of the deed was the 17th November, 1847 ; the Act did not pass till the 1st August, 1849. The deed provided that the first dividend was to be paid in March, 1848, and there is nothing in the record to show that that was not done ; nor is any thing stated that is inconsistent with the proposition that, before the Act was passed, the whole estate had been realized, and had been completely or in * part divided among the * 492 creditors who had before that time executed the deed.

In like manner the clauses in the deed which relate to the payment of the dividends confine that payment to those creditors who should have executed the deed ; and those clauses make arrangements for a reservation of a share of the dividend, in favour of those creditors only who could not have had time and opportunity to come in and assent to the deed ; but they expressly exclude those who having had time and opportunity to do so did not come in and assent to it. Now, it being the duty of the inspectors to declare the release of the estate as soon as possible, it might easily happen that between March, 1848, and the 11th October, 1849, when the Act of Parliament came into operation, the whole estate might have been realized and divided.

It may be true that there are no conditions mentioned, as such, in the statute ; but the directions how to frame a deed are in law conditions, the observance of which will alone render it valid. The 228th section says, that the estate is to be distributed " as in

bankruptcy." If therefore the statute should be held to apply to this deed, it is bad, for that provision has not been regarded ; for in this deed there is a reserve of a very considerable sum, such as could not be reserved in bankruptcy. That reserve is a violation, not of the mere forms, but of the very principles of bankruptcy. There is besides a reserve of wearing apparel, linen, furniture, and plate, as to the value of which no limit is assigned, and which might therefore have amounted to a very large sum. It cannot be said that the law means only that so much of the estate shall be distributed as had been assigned, and that no particular proportion was required to be assigned, and there-
 * 493 fore that this *reserve of plate and household furniture does not effect the validity of the deed, for to put such a construction on the 224th would in fact be to repeal the 228th, which could not then be carried into effect.

If it is said that six sevenths are trustees or attornies for the other seventh, they must act in the name of their principals, but the creditors who have not executed the deed can in no way be considered their principals. Lord Campbell says in *Tetley v. Taylor*,¹ "a great power is certainly given to the six sevenths, in number and value, of the creditors, but they can only place the remaining seventh in the same situation in which they have placed themselves." By this deed the one seventh and the six sevenths are not placed in the same situation ; so that even the judgment most relied on by the other side (that of the Court of Queen's Bench in *Tetley v. Taylor*) does not, when applied to the facts here, support the argument for the plaintiffs in error.

This case does not alone depend on the decision of the Court of Exchequer Chamber in *Tetley v. Taylor*. The case of *Waugh v. Middleton*,² decided that the statute applied only to such deeds as were inchoate at the time of the passing of the Act. That did not mean such as might not have been carried fully into effect, but such as were merely in the course of execution by signature. To give a different meaning to the words "now or hereafter to be executed," would be to make the statutory provisions apply to cases which were not at all within the provisions of the statute. *Fisher v. Bell*³ was decided by the Court of Common Pleas, after the Judges, who decided it, had heard two arguments, first in that

¹ 1 Ellis & B. 529.

² 12 C. B. 363.

³ 8 Exch. 352.

case itself, and next when sitting in the Court of Exchequer Chamber on the writ of error in *Tetley v. Taylor*. The doctrine there laid down was, that a deed of arrangement, to be within the statute, must *provide for the entire distribu- *494 tion of the trader's estate and effects; and it was followed by the Lords Justices in *Ex parte Wilkes In re Wilkes*,¹ where it was held that a deed of arrangement which did not provide, except in certain cases, for the assignment of all the debtor's estate, was not a deed within the statute. There is no absolute assignment here of all the trader's effects; but there is a reservation of a large amount of property. The intention of the statute is thus defeated. That intention was to provide an equal distribution among the creditors, according to their legal rights, of all the debtor's property, not to leave it to any body of creditors to determine how much any other body of creditors, though smaller in number and value than themselves, should suffer a loss upon their lawful claims. It is admitted on the other side, that the principles of bankruptcy are to be applied to these deeds. Those very principles forbid a deed like the present, and it having been sufficiently executed, so far as signatures were concerned, long before this statute passed, and the estate having been capable of final winding up before the date of the statute, it cannot be held to be protected by the statute, and to be enforceable against non-assenting creditors.

Sir F. Thesiger, in reply. — Such a deed as this was in contemplation of the Legislature when the statute was passed. There had already been legislation expressly on the subject in the 7 & 8 Vict. c. 70, and incidentally in some other statutes. It was not therefore a matter new in practice, or new to the law, and of this fact the Legislature was cognizant when the phrase “now or hereafter entered into” was used. The phrase “now entered into” must mean those deeds which were in existence as deeds completely entered into, though of course not completely carried into effect when the statute passed.

* As to *Ex parte Wilkes*, that was decided on the author- *495 ity of the case of *Tetley v. Taylor* in the Exchequer Chamber, and, the authority of that case being now in question, cannot therefore with propriety be cited in argument.

¹ 5 De G., M. & G. 418.

The object of the Legislature was to get the estate wound up, with the consent of a large majority, both in number and value, of the creditors. This is not a case in which the Legislature could have intended that there should be an administration of the whole estate precisely as in bankruptcy, so that any reserve of a sum of money should have the effect of taking it out of the arrangement clauses of the statute, and defeating the will of the great majority. The words "in like manner," in the 228th section, do not apply to the amount to be distributed, but to the mode of distribution; that is, joint assets are to be applied to joint debts, and separate assets to separate debts. The 226th section shows that the Legislature did not contemplate that there must necessarily be an assignment, for it provides that in certain cases where there is no trustee or inspector, the certificate of two of the creditors that the deed has been duly signed by six sevenths in number and value shall be sufficient. It is impossible therefore, if the Legislature contemplated the possibility of their being no assignment at all, that it should have required an absolute assignment of the whole estate.

THE LORD CHANCELLOR proposed the following questions for the consideration of the Judges:—

First. Whether the deed set out in the plea, if it had been dated and executed by six sevenths in number and value of the creditors after the Act 12 & 13 Vict. c. 106, came into operation, would have been void as a deed of arrangement within the meaning of the 224th section of that * statute, by reason of its not providing for the distribution of the whole estate of the debtors?

Second. Whether it was such a deed of arrangement between the trader and his creditors as was contemplated by that section?

Third. Whether the plea affords a good defence to the action?

July 9.

MR. BARON PARKE on this day delivered the opinion of the Judges. After stating the questions, he said:—

My Lords, with regard to the first of these questions, her Majesty's Judges, after some consultation, are not prepared at this moment to say that they are all agreed. There is some difference of opinion amongst them, though it is not at all unlikely that on

further consideration they may all be of the same opinion. But at present we propose, with your Lordships' sanction, not to answer that question; because, upon the second and third questions, we all agree in considering that this deed is not within the meaning of the statute, and that the plea affords no defence to the action.

The second and third questions may be considered most conveniently together. We are of opinion that the deed in question, if not void on the ground that all the debtors' property was not included in it, still did not constitute a good defence to the action.

In the first place, the deed was not a deed of arrangement made before the Act of the 11th and 12th of Victoria, chapter 106, within the meaning of the 224th section. That section certainly cannot apply to deeds, completed in all respects, under which the property of the debtor had been conveyed and disposed of before the 11th of October, 1849. It applies only, as stated in *Waugh v. Middleton*,¹ to inchoate deeds; and possibly the true construction is, that it applies to "arrangements," not deeds, now entered into * between the trader and his creditors, and to * 497 deeds and memoranda afterwards signed. But at all events the clause does not apply to a deed, which has so far been acted upon, that a creditor, after the Act came into operation, could not be put on an equal footing with those who had signed, if he chose to come in under the deed. And upon the plea in this case, it does not appear that the plaintiff below, the present defendant in error, could now be placed on that footing; for a dividend may have been paid to all the subscribing creditors in March, 1848, when the first dividend was payable, and the plaintiff may now not be entitled to receive it; and he may have been defeated by the provision in the deed, which excludes those creditors from a reserved dividend, who have had reasonable time to assent to the arrangement, and have neglected so to do. Nay, the whole of the debtors' estate may have been distributed consistently with the plea; and to hold that the deed must operate as a release in that case, would be most unjust.

We have some doubt whether the deed is not void, as making the estate distributable amongst, not all the creditors, but those only who execute the deed. We should have clearly thought so, except that such a deed is in practice common, and in all cases of

¹ 8 Exch. 352.

a conveyance for the benefit of creditors, it is for the distribution of the estate amongst the creditors, parties to the deed. But if we cannot take notice of that, as probably we ought not to do, the deed is void on this account also.

It is unnecessary to say whether the notice of the deed simply, or notice of its having been executed by six sevenths of the creditors, is requisite, or to decide upon the other objections to the plea, which are, however, probably unfounded.

July 23.

THE LORD CHANCELLOR. — This was a writ of error against the judgment of the Court of Exchequer Chamber, the question arising in an action that * was brought upon a bill of exchange against the defendants in error, John and James Bibby, by the plaintiffs in error, for a sum of 1500*l*. The plea to this action was in substance a plea of release, but the release was not pleaded *simpliciter* as a release, but as a deed of arrangement between the plaintiffs in error, Larpent and another, and their creditors, whereby, in the usual way, it was stipulated, that the business in which the plaintiffs in error had been engaged should be wound up under inspectors. And then a deed was made between them of the first part and certain trustees of the second part, and the creditors who have executed it upon the third part ; it was a common deed of arrangement between them and their creditors. That deed was pleaded as a bar to the plaintiffs' demand ; it was decided in the Court below, that it was no bar, and the question for your Lordships to determine is, whether or not that decision is right ?

The case was opened at your Lordships' bar as one that would give rise to a very important discussion, namely, to what extent, under the Arrangement Clauses, as they are called, of the Bankrupt Law Consolidation Act of 1849, a deed of arrangement which is executed by six sevenths of the creditors, is a bar, not only as against those creditors, but as against others. The question that was opened as being involved in this case was, whether such an arrangement must be an arrangement whereby all the property of the debtor was delivered up to his creditors, or whether it would be within the purview of that statute that there should be a deed of arrangement made, whereby certain of the property was to be given up and certain of the property reserved by the debtor in

such a way as six sevenths of the creditors should approve? But in the course of the argument it was suggested by the defendants in error, that, however important that question may be, — I mean that which was discussed in the Court of Exchequer Chamber, in the case * of *Tetley v. Taylor*,¹ — in truth it does * 499 not arise here, because this deed does not come within that class of instruments contemplated by that statute; for that in truth this is a deed which was executed long before the passing and coming into operation of the statute, and was so executed as not to be binding upon those who had not executed it.

The course which the pleadings took was this. [His Lordship here stated the pleadings.]

Taking the deed in this way, the question is, whether the present defendants not having executed this deed, but it having been executed by more than six sevenths of the creditors, this is a deed which binds these defendants in error, the holders of the bill of exchange. That will depend upon certain clauses in the Bankrupt Law Consolidation Act. The 224th section, which is the important one, provides; [His Lordship read it and also the 228th section.]

The first thing that strikes one is this, that this was a deed executed before this Act came into operation; before, therefore, there was any enactment making such a deed obligatory or binding upon any one who had not executed it. But then the plaintiffs in error say that though it is true that that was the case, yet this enactment extends not only to deeds executed after the Act came into operation upon the 11th of October, 1849, but the enactment being in these terms, “every deed or memorandum of arrangement now or hereafter entered into between such trader and his creditors,” the argument was, that though this deed was not executed by the creditors when this enactment was in force, yet the Act is made retrospectively to have operation by the words in that section, “every deed now executed or hereafter to be executed. That is the way in which they interpret that enactment.

* This question as to whether the 224th section applied * 500 to deeds executed before the Act came into operation, was a question which came to be argued before the Court of Exchequer in the case of *Waugh v. Middleton*,² and there the Court

¹ 1 Ellis & B. 521 – 532.

² 8 Exch. 352.

of Exchequer held that the words "now executed" cannot be read as generally referrible to all deeds that had heretofore been executed, because that would give a retrospective operation to deeds, all transactions under which might have been long ago closed; that the word "now" must mean deeds which are inchoate, which have been prepared, as it were, and executed by some of the creditors, but the doings and actings under which remained to be done at the time when the Act came into operation.

When this case was argued at your Lordships' bar, we had the benefit of the attendance of a large number of the learned Judges, and they have given their opinion through Mr. Baron Parke; that opinion being, as to some of the points submitted to them, unanimously adopted. As to one of the points submitted to them, they have given no opinion. The matters submitted by your Lordships to the Judges involved a general question, which I may describe shortly as that which was argued in the case of *Tetley v. Taylor*, namely, whether a deed now executed would be within the purview of the statute, if it did not dispose of all the property of the debtor. Upon this point, there having been a difference of opinion between the learned Judges at different times in different Courts, they have intimated to us that they were not prepared to give a unanimous opinion, though they rather seemed to intimate that, in spite of the doubts which had previously existed, they might be able eventually to give a unanimous opinion. But being unanimously of opinion that whatever might be the construction of the Act as applicable to deeds

*501 that are now to be executed, the clause certainly * does not apply to this deed, inasmuch as this was a deed executed not only long before the Act came into operation, but under which, for aught that appears in the plea, the whole of the property may have been distributed previously to the Act so coming into operation, and certainly a very large portion of it was so distributed. It is a deed, therefore, under which the creditors who had not executed it when the Act came into operation, could not be, or possibly might not be, capable of being put into the same position as those who had executed it at an earlier period. The learned Judges were unanimously of opinion, that to such a deed the provision of this statute could not have been meant to apply.

Fully concurring, so far as I am concerned, with the Judges in that view of the case, I do not think I should be properly occupy-

ing your Lordships' time by doing more than saying that that is consistent with all good sense. It is certainly, I think, an interpretation capable of being put upon the language of this section, and is an interpretation which in furtherance of ordinary justice we must presume to have been conformable to the intention of the Legislature. I have therefore only to say, that I concur in the view taken by the learned Judges, and am clearly of opinion, that the plaintiffs in error have failed to establish any case to shake the judgment which has been already given. I simply feel it my duty thus to declare my concurrence, and to move your Lordships that judgment should be given for the defendants in error.

I must observe that Mr. Baron Parke, in stating the opinion of the learned Judges, intimated a doubt, which I think very likely may be well founded, whether the word "now" in that 224th clause refers to deeds at all. It may be that that may be the true construction. I give no opinion upon it, but I wish at the moment to say, that it * has not escaped observation. If * 502 the question should hereafter arise, it will be open to contend, in conformity with the opinions of the learned Judges, that possibly the construction may be, every deed or every memorandum or arrangement now or hereafter to be entered into ; that is to say, every deed which is to be made hereafter (as generally speaking, laws take effect only from the time of their enactment, and not retrospectively), every deed which is to be executed, or any memorandum of arrangement which is to be hereinafter carried into effect by a deed. That is what, as I understand it, Mr. Baron Parke suggested as a plausible interpretation of that clause, though I do not think that that is the exact interpretation put upon it by the Court of Exchequer. But whether the one or the other interpretation is the right one, I am clearly of opinion with the learned Judges, that this being a deed, the whole or a large portion of which, for aught that appears in the plea, may have been completely carried into effect before the Act came into operation, to apply the deed to creditors who might execute it afterwards, might be working very great injustice. It is, therefore, not a deed to which the statute applies, and consequently the defendants in error are entitled to judgment.

LORD BROUGHAM. — I entirely agree with my noble and learned friend and with the learned Judges in this case, that the question

respecting the real meaning and effect of the 224th section, together with the other question somewhat involved in the case, how far the 228th section may be construed without reference to the 224th, does not necessarily arise in this case; that this deed is not necessarily within the operation of that section, whatever may be your opinion as to what the construction of that section ought to be.

* 503 * It is very satisfactory that the learned Judges agree upon this point. With respect to their difference on the other point, the true construction of the 224th section, which is really a very important question, we may certainly defer saying a word until it comes before us, when we can consider it with the benefit of the opinions of the learned Judges, who still may be supposed to differ among themselves as to its answer, though from what the learned Baron said the other day, there is a possibility that in the end that difference may cease. Up to the present time there has been a division of opinion in the Courts below, and we have reason to expect that there may be a similar division among the learned Judges here. I think it exceedingly probable that the construction suggested by the learned Baron towards the close of his argument, in stating the opinion of himself and his brethren, may be correct; namely, that the Legislature in this section meant to deal differently with deeds and with memorandums of arrangement, and when saying "every deed" must, on the principle stated by my noble and learned friend, be taken to use that phrase prospectively, and to mean that every deed in future to be executed shall be within the operation of these arrangement clauses. It is very possible that the Legislature meant to make a difference between deeds and memorandums of arrangement, now or hereafter entered into; that is to say, arrangements then in progress may have been saved by that section, though the deed itself, being a finished thing, may have been meant not to be saved, not to be affected by the section; and therefore the Act applies, as it would do without special provisions, only prospectively; that is, to deeds hereafter to be executed.

Judgment for the defendants in error, with costs.

Lords' Journals, 23d July, 1855.

1855. July 23.

JOHN NOBLE, *Plaintiff in error.*ELIAS PAUL GADBAN, *Defendant in error.*

Bankruptcy. Deed of Arrangement. Reserve. 12 & 13 Vict. c. 106.

A deed of arrangement, though executed by six sevenths in number and value of the creditors of an insolvent estate, will not be binding on the rest, if executed so as to be capable of being carried into effect before the passing of the Act 12 & 13 Vict. c. 106.

Quære. Whether such a deed to be valid within the statute must provide for the complete distribution of the insolvent's estate and effects without any reservation whatever?

Quære. As to the effect of the word "now" in the 224th section of the statute. It seems that it is void if it only provides for such distribution among those creditors who are parties to it. (See the last case.)

THIS was an action by Gadban against Noble on a bill of exchange for 836*l.* 10*s.* 5*d.*, of which the plaintiff was the payee and the defendant was the acceptor. The plea was similar to that in the last case. The plaintiff replied to the plea that two of the partners in the deed of assignment mentioned had become bankrupt. Nothing, however, turned on this replication. The plaintiff also demurred to the plea, stating as a reason, "That the deed in the plea alleged does not appear to be such a deed as would be binding upon the plaintiff according to the provisions of the Bankrupt Law Consolidation Act" (12 & 13 Vict. c. 106, sec. 224 *et seq.*). The defendant joined in demurrer, and the Court of Exchequer and the Court of Exchequer Chamber successively gave judgment for the plaintiff. This writ of error was then brought.

Sir F. Theziger, Mr. M. Smith, and Mr. Tomlinson appeared for the plaintiff in error; and

Mr. Bramwell and Mr. Willes for the defendant in error.

This case was treated as depending on that of *Larpent v. Bibby*, and judgment was given for the defendant in error, with costs.

1854. June 29 ; July 4. 1855. May 21 ; July 31.

HENRY UNWIN,	<i>Plaintiff in error.</i>
CHARLOTTE HEATH, Administratrix of JOSIAH	} <i>Defendant in error.</i>
MARSHALL HEATH, deceased,	

Patent. "Carburet of Manganese."

Where a patent has been obtained for the use of a known substance, described by its specific name, and it is afterwards discovered that the use of two other and equally known substances will produce the same effect, though the evidence of scientific men may go to show that the two substances become, in the act of so using them, the one substance described in the patent, their use will not constitute an infringement of the patent.

A. obtained a patent for an improved mode of manufacturing cast steel by the use of "carburet of manganese." This substance was well known, but was very expensive. At the time the patent was taken out, it was known that carburet of manganese might be obtained from the combination of two inexpensive articles, oxide of manganese and coal tar. Some little time after the patent had been in existence, it was found that if oxide of manganese and coal tar were put into the melting pot with the metal, cast steel would be produced equal to that which was produced by the aid of the "carburet of manganese." Some of the witnesses said that the carburet was produced in the melting pot at the instant of the fusion of all the ingredients therein contained :

Held, that the use of these two articles in that manner was not an infringement of the patent.

THIS was a writ of error brought to reverse a judgment of the Court of Exchequer Chamber, which had reversed a judgment of the Court of Common Pleas.

On the 5th of April, 1839, Josiah Marshall Heath took out a patent for his invention of "Certain Improvements in the Manufacture of Iron and Steel." The specification stated the invention to relate to four matters, of which it is only necessary here to mention the last : "Fourthly, the use of carburet of manganese in any process whereby iron is converted into cast steel."

* 506 In describing this invention * in the specification, the patentee said : "I propose to make an improved quality of cast steel, by introducing into a crucible bars of common blistered steel, broken, as usual, into fragments, or mixtures of cast or malleable iron, or malleable iron and carbonaceous matters, along

with from one to three per cent. of their weight of carburet of manganese, and exposing the crucible to the proper heat for melting the materials, which are, when fluid, to be poured into an ingot mould in the usual manner ; but I do not claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of my invention, but only the use of carburet of manganese in any process for the conversion of iron into cast steel."

In another part of the specification he said, " I claim the employment of carburet of manganese in preparing an improved cast steel."

There was no doubt of the great value of the invention, the result of which was to render British iron capable of being converted into cast steel, equal in quality to that which, previously, had only been obtained from the use of the best Swedish iron. At the time of the invention, carburet of manganese was a well-known but very expensive article of commerce. Experiments had been made with oxide of manganese in the conversion of iron into steel, but the oxide constantly destroyed the melting pots. Oxide of manganese is one of the two elements of which carburet of manganese is composed ; the other, it was well known, was a carbonaceous matter. At the time of the patent being taken out both were employed to make carburet of manganese ; and though both were in themselves of moderate price (about 7*l.* a ton), the carburet when produced, was of considerable value, being between 7*s.* and 8*s.* a pound. Shortly after the enrolment of the * pat- * 507 ent it was discovered apparently in Mr. Heath's manufactory, that if, instead of employing carburet of manganese, the two elementary matters of which it was composed were introduced into the pot, they would, when the steel was on the point of melting, be converted into carburet of manganese, and the same effect, as regarded the quality of the steel, would be produced, as if the carburet itself had been employed. The patentee took advantage of this discovery as to the use of the two elements of carburet of manganese instead of the carburet itself, and made a composition of black oxide of manganese and coal tar, which he sold under the name of Heath's Composition. The plaintiff in error, among others, abandoned the use of the carburet, and employed only oxide of manganese and carbonaceous matter in the manufacture of cast steel, and refused to pay any royalty to the patentee for

their use, on the ground that this mode so employed to manufacture the cast steel was a new mode of manufacture, and was not that which Mr. Heath had patented.

An action was brought in the Court of Exchequer, and tried at Westminster before Lord Abinger, in June, 1843, when the plaintiff was nonsuited, and afterwards failed in a motion to set aside the nonsuit. He then brought in the same Court another action, which was tried at Westminster in June, 1844, before Mr. Baron Parke, when the plaintiff obtained a verdict; but on motion made, the Court afterwards gave judgment that there had been no infringement, and directed the verdict to be entered for the defendant.¹ Proceedings were afterwards taken in the Court of Chancery, and the Vice-Chancellor of England directed another action to be brought. Mr. Heath then brought his action in the Court

of Common Pleas, and the cause came on for trial before * 508 Mr. Justice Cresswell, at Westminster, in the *sittings after Hilary term, 1850, when that learned Judge expressed himself bound by the judgment of the Court of Exchequer as to the question of infringement, and directed a verdict for the defendant on the ground that there had been no infringement of the patent. On that direction a bill of exceptions was tendered, and the case being taken to the Exchequer Chamber, the Judges there differed in opinion;² Mr. Baron Alderson and Mr. Justice Coleridge being of opinion that the direction was correct, and Mr. Justice Wightman, Mr. Justice Erle, Mr. Baron Platt, and Mr. Justice Crompton thinking it incorrect, for that the use of the elements of carburet of manganese was, under the circumstances stated in the bill of exceptions, the use of carburet of manganese in the manufacture of steel, within the meaning of the patent.

The present writ of error was then brought. The Judges were summoned and the Lord Chief Justice of the Court of Common Pleas and Mr. Justice Coleridge, the Lord Chief Baron of the Court of Exchequer, Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Maule, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. Baron Platt, Mr. Justice Williams, Mr. Justice

¹ 13 M. & W. 583.

² 12 C. B. 522. Much evidence was given upon the mode in which the carburet of manganese was formed in the melting pot, and it became the frequent subject of comment in the opinions of the Judges. It is sufficiently noticed by them to prevent the necessity of printing it here. See post.

Crompton, and Mr. Justice Crowder attended. As the first two named of the learned Judges did not hear the whole of the arguments, they did not ultimately deliver any opinion on the case.

Sir F. Kelly and *Mr. T. Jones* (*Mr. Deighton* was with them) for the plaintiff in error. — There has not been any infringement here. The patent is for a certain process, in which is employed a well-known substance, carburet of manganese; * 509 the supposed infringement is that of effecting the same result by a different process, namely, by the mixture of black oxide of manganese and a carbonaceous substance. The two things are not the same. If there had been a patent for the use of diamond in a certain process, and it had afterwards been discovered that the same result could be produced by throwing in common carbon and some other ingredient, the employment of those two things would have been a new discovery, not an infringement of the patent. The use of these two materials was never contemplated by the patent. The very terms of the description show them to be different processes, and they cannot be treated as the same, because the same result is produced by them both. It cannot be said, because carburet of manganese may be produced by the union in the melting pot of the black oxide and the carbonaceous matter, that therefore the carburet is used as the agent of the new process. At the time the patent was taken out, it was not known that the oxide of manganese and the carbonaceous matter, when put into the crucible with the blistered steel, would there form the carburet of manganese. It is said that the two things are equivalent to each other, but if that which is equivalent to a known substance is not known to be an equivalent, the discovery that it is so becomes a new invention. If they were known to the patentee to be equivalent processes, and he has only pointed out the carburet, which was an expensive article, while he knew and intended to use the oxide and the carbonaceous matter, he has done that which was highly improper, for he has not given the public the benefit of his real invention, and the patent is therefore void. The proportions of the chemical agents in the two processes are not the same; they are one to three per cent. of carburet of manganese in the patent; the oxide of manganese and coal tar * 510 are now known not to be required in the same proportions, and if they formed part of the invention, the patentee should have

which, in his specification, he stated to be prepared from what was known in the trade as the "best selected copper," and from "foreign zinc," these being, in fact, purified products of copper and zinc; the defendant used ordinary copper and zinc, but purified them in the process of making the sheathing. Lord Lyndhurst held that to be an invasion of the plaintiff's patent.

The invention here was the discovery of a principle. When that is once discovered scientific men can always find several *513 methods of carrying it into effect; but each * will be but the application of the same principle, and an infringement of the patent which protects the discovery: *Jupe v. Pratt*,¹ *Mangnall v. Benecke*,² *The Electric Telegraph Company v. Brett*.³ The doctrine as to an intention to infringe, stated in the judgment of the Court of Exchequer,⁴ was commented on, and denied by the Lord Chancellor, in *Stevens v. Keating*,⁵ and by the Vice-Chancellor of England in *Heath v. Unwin*.⁶

The specification itself shows the detailed use of the separate materials which are employed in the process; but in compliance with the rule laid down in *Savory v. Price*,⁷ it uses the name of the product obtained by their combination. In fact, therefore, the specification does contain a complete statement of the two equivalents which have been employed in carrying into effect the patentee's discovery.

Mr. T. Jones, in reply. — To sustain the argument on the other side, it must be held that a patent, for the use of carburet of manganese is infringed by the use of any two or more things which now, or at any future time, may be found to produce the same results. *Stevens v. Keating*, as now stated in argument, is the only cited case that really has any application at all to the present; but the difference between the two is great: for borax, and its component parts, and their chemical powers, had been known for a great many years before the patent; but that the oxide of manganese and coal tar would produce all the effects of carburet of manganese was not known till after the date of this patent. That discovery was then for the first time made.

¹ 1 Webst. Pat. Cas. 144.

⁵ Norman on Patents, 135.

² 20 Law J. N. S. C. P. 123, 10 C. B. 838.

⁴ 13 M. & W. 593.

⁶ Not reported.

⁷ 16 Law J. N. S. Ch. 283, 15 Sim. 552.

⁸ Ryan & M. 1.

To hold this to be an *infringement of the patent would *514 be, first, to give the patentee the benefit of a discovery which, if he knew at the time, he wrongfully concealed from the public, for there is not a reference to it in his specification ; and next, it would be to check, during the existence of any patent, all efforts to obtain the same results by easier and cheaper means.

The LORD CHANCELLOR, after observing that the case had been very ably argued, proposed the following question for the Judges: —

“ Whether looking at the record, as set forth in the Joint Appendix to the printed cases, there was evidence for the jury that the plaintiff in error was guilty of an infringement of the patent stated in the declaration, by using oxide of manganese and carbonaceous matter in the manufacture of cast steel, in the manner in which, according to his admission at the trial, he did use them ? ”

THE LORD CHIEF BARON, in the name of the Judges, requested time to consider the answer.

1855. May 21.

Mr. Justice Crowder. — My Lords, — To the question upon which your Lordships have desired the opinion of the Judges, I answer, that in my opinion there was evidence for the jury of the infringement of the patent.

The defendant in error took out the patent for certain improvements in the manufacture of iron and steel, and in his specification he mentions several ; but the only one material to this inquiry is that which refers to the use of carburet of manganese.

The question proposed by your Lordships arises upon the plea of not guilty. There are other pleas upon the *record *515 raising issues as to the novelty of the invention and the sufficiency of the specification, which were found by the jury for the plaintiff below ; and, indeed, for the purpose of considering the question of infringement, the invention must be assumed to be new, and well described in the specification. He declares the nature of his invention to be [his Lordship stated it].

By this language I understand the substance of the invention to be the application of carburet of manganese to the manufacture of cast steel, in order to improve its quality ; and I understand the *modus operandi* to be substantially the melting together in the crucible carburet of manganese and blistered steel or iron. It follows, I think, that the patentee is protected by his patent against the use of carburet of manganese with iron or blistered steel in its conversion into cast steel, in any mode in which those substances are brought together in a fluid state in the crucible so as to produce the same result. It seems to me to be immaterial in what manner, or at what time, the carburet of manganese is formed, provided it be present in a fluid state when the cast steel is in a condition to be poured into the ingot mould. It appears from the evidence, that when the patentee obtained his patent, and for some time afterwards, he was in the habit of first making the carburet of manganese by melting together coal tar and oxide of manganese; and when that product had been obtained in a solid form, it was put into the crucible with fragments of iron or blistered steel, and the fusion of these materials together produced an improved cast steel. It was afterwards found by the patentee, and communicated by him to the plaintiff in error and others, that if, instead of making the carburet of manganese first, and then putting it into the crucible with iron or blistered steel, its component

* 516 parts, coal tar and oxide of manganese, were put into * the crucible with the fragments of iron or blistered steel, the carburet would be produced in a state of fusion, and would then operate precisely in the same manner in the improvement of the cast steel, with a very great saving of expense. And it is admitted, that the plaintiff in error has manufactured cast steel by placing coal tar and oxide of manganese in the crucible with iron, and melting them together.

Now, there is ample evidence upon the record from the scientific witnesses for the jury to infer that by this process carburet of manganese is formed in the crucible at a lower temperature than that at which the iron is fused, and that its action afterwards in alloying with the steel is the same as when the carburet of manganese is first put into the crucible in its solid form, and then melted; and that was indeed admitted in argument at your Lordships' bar: but it was contended that, assuming such a state of facts to be clearly estab-

lished in proof, it would afford no evidence of an infringement of the patent.

It seems to me, however, that it is evidence of a direct infringement, because it shows the use by the plaintiff in error of carburet of manganese melted with iron in the process of its conversion into cast steel, which is substantially the invention patented by the defendant in error. I do not perceive here the use of chemical equivalents, but I observe a direct use of the identical chemical agency described in the specification. The carburet of manganese in a fluid state acts in both processes upon the fused iron, and produces the same effect. The point to be reached in both processes, before the carburet of manganese can act upon the iron, is the fusion of all the ingredients. When that has been accomplished the action takes place, and the desired result is produced in the cast steel. The only difference between the processes of the plaintiff and the * defendant is what occurs before that * 517 point is reached. The defendant in error makes his carburet with coal tar and oxide of manganese, and puts it, when in a cold and solid state, into the crucible to be fused with the iron. The plaintiff in error makes his carburet with the same ingredients, but puts them in the crucible together with the iron, and melts them with one and the same heating; but in doing this he produces his carburet of manganese in a fluid state, before the iron is fused or acted upon by it.

It is said, however, that both the language of the specification and the evidence in the cause abundantly show that the patentee never contemplated such a mode of combination of carburet of manganese with iron as is used by the plaintiff in error, and that, therefore, the use of it could not constitute an infringement of the patent.

A similar argument was urged by the defendant's counsel in the case of Nielson's hot blast patent, *Nielson v. Harford*,¹ but without success. There it was clear that the patentee was unacquainted, when he filed his specification, with the most beneficial mode of carrying his invention into effect. But it was held, that although the use of pipes by the defendant, which had not been in the contemplation of the patentee, was an improvement, it was nevertheless an infringement of the plaintiff's patent.² And in *The*

¹ 1 Webst. Pat. Cas. 304.

² 1 Webst. Pat. Cas. 328.

*Electric Telegraph Company v. Brett*¹ it was decided that a patent "for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits" was infringed by the defendant, whose electric currents were transmitted through a circuit, nearly one half of which was formed by the earth instead of by metallic wires, although it was unquestionably a great improvement on the original * 518 invention, * and although at the time of filing the specification it could not have been in the contemplation of the patentee, because the discovery had not then been made that the earth would act in the same manner as a metallic conductor in completing the electric circuit. And so I think here the process of the plaintiff in error is an improvement upon the invention of the defendant in error, while, at the same time, it is an infringement of his patent.

MR. JUSTICE CROMPTON. —I think that there was some evidence for the jury of an infringement of the patent in this case, and I have already given my reasons for this opinion at considerable length in the Exchequer Chamber.

I would observe, however, that I do not agree with the argument for the plaintiff in error, that the question of infringement can depend on whether the mode of working alleged to be an infringement was or was not known to the patentee or to those skilled in the particular matter at the time of the specification. On a plea raising the question as to the sufficiency of the specification, the knowledge of the patentee may be material; but upon the only issue now under consideration, the patent is to be taken to be valid, and the invention, as claimed, to be useful and novel, and it is to be taken that the patentee has specified all that he could be required to have specified. If a new process, of which he and all others were ignorant at the time of the specification, is found out afterwards, the exercise of such new process may be an infringement, provided that it is substantially the same with or includes the patented invention. An improved method of doing in effect the same thing may well be an infringement of the patent, though not known at the time of the specification.

* 519 * Neither do I agree with the argument of the plaintiff in error, that this invention was merely putting solid pieces of carburet into the pot with the broken pieces of iron. I have

¹ 20 Law J. N. S. C. P. 123.

before given my reasons for thinking that the invention claimed was the use of the carburet in the manufacture of the steel, and for thinking that there was some evidence for the jury that the new process was an improved and neater mode of carrying on the old invention.

It was said that what was done in the present case was an equivalent merely for what was pointed out in the patent and specification, that all known equivalents must be expressly or impliedly specified, that the alleged equivalent in the present case must be assumed to have been unknown at the date of the specification, and that it must be treated as a new discovery not within the range of the patent, and excluded from the specification, and, therefore, not an infringement.

Such an argument could only, in my opinion, be of any weight in cases where the supposed equivalent is something really different from the thing itself, as if in the present case the alleged infringement had been by using instead of the carburet of manganese one or more substances which, alone or united, though not being carburet of manganese, would have had the same effect in making the improved steel, — the use of such different things producing the same effect, whether operating in the same or a different manner might be the use of things out of the patent, and might properly be called the use of an equivalent. The present is not, in my opinion, the use of what can be properly termed an equivalent. If the oxide and the carbonaceous matter operated so as to produce the same effects as the carburet without forming the carburet, they might possibly be deemed equivalent to it, but the evidence was pointed * to a direct using of the *520 carburet. I look upon this, therefore, as a case not of any equivalent, but as a case where there was evidence of a direct infringement of the patent by the use of the carburet of manganese. The effect of the evidence was, that the carburet of manganese was made in a less expensive way in the pot, instead of a more expensive way out of the pot.

The knowledge or intention of the party infringing the patent is now most properly admitted to be immaterial; and if there was no evidence of infringement in the present case, any person might, after the patent and specification came out, have gone to a scientific chemist and said: "There is a new invention of making improved steel by applying carburet of manganese to the iron in the

process of melting ; cannot we manage to put together the ingredients of carburet of manganese in packages, and put these packages in the pot, so that the carburet may be formed in the pot and have the same effect as if put in in the shape of carburet ? ” And the execution of this plan would, according to the argument of the plaintiff in error, have been no infringement, but would have merely been the legitimate use of a new discovery. To my mind it would appear to be a direct use of the carburet in the making of an improved steel.

The only way in which I think there would be a defence on the plea of not guilty is, if your Lordships should adopt the argument which I have before referred to, and should hold the invention not to be the use of the carburet in the manufacture, but merely the putting into the pot the specified materials in the manner and proportions pointed out by the plaintiff as his *modus operandi*. And this appears to me to be the real question in the case. I think that it would be a narrow and dangerous construction to

limit the invention, claimed in express words, by the mode
 * 521 * and process of working which the plaintiff sets forth as a means of carrying his invention into effect.

I would add, with reference to what was stated at the bar to have been the evidence given at the late trial at Liverpool, which, though not on the record, I may refer to as a supposed state of facts, that supposing there had been previously to this patent a public and well-known user of putting the oxide of manganese and carbonaceous matter with the iron into the pots, and it had appeared by the evidence of chemists that this process, though not known to do so at the date of the patent, really operated by the formation of carburet of manganese within the pot, and that when formed the carburet applied itself to the iron ; and supposing, that in such a state of the manufacture the plaintiff had taken out his patent for the employment of carburet of manganese in the manufacture of steel, I should think it clear that there was evidence to go to the jury that the patented invention was not novel. It certainly would seem strange if the patent claiming the invention of the employment of the carburet could be supported, when it appeared that the carburet had been long so employed by being formed in the pot from the oxide and the carbonaceous matter, though the exact mode of the operation had not been known. In fact, the plaintiff's invention in such a case would have been,

what indeed it seemed from the evidence at the trial at Liverpool to have really been, a discovery of a worse and more expensive mode of applying the carburet. If proof of such user before the patent would be evidence that there was no novelty, it seems to follow that the user after the patent would be evidence of an infringement.

The argument urged at the bar as to its being matter of speculation and of doubt, whether the carburet was really formed in the pots before it alloyed itself with the steel, * would * 522 only go to prove that the weight of the evidence for the jury was less. But I think that there was clearly some evidence of that fact, and if so, that there was evidence for the jury, that the new process was an "employment of the carburet of manganese in the manufacture of steel," though in a method improved and neater than the one first adopted by the plaintiff, and mentioned by him in his specification as a mode of carrying out his invention.

I answer your Lordships' question, therefore, in the affirmative.

MR. JUSTICE WILLIAMS. — My Lords, this case appears to me to turn entirely on the question, what is really the invention described and claimed by the patentee in his specification.

If it is merely the particular process for the manufacture of cast steel therein described, then, in my opinion, the plaintiff in error would not be guilty of any infringement of the patent by reason of using the oxide of manganese and carbonaceous matter in that manufacture in the manner in which it is admitted he did use them. For, according to the described process, carburet of manganese, a then existing thing, is to be put into the crucible together with steel or iron, in defined, though not exactly defined, proportions of weight to each other, and then heat is to be applied. Now it is plain that the melting together of oxide of manganese and carbonaceous matter with steel or iron is no direct infringement of a patent for this process. And the only question can be, whether it is an indirect infringement by the substitution of an equivalent. There is ample evidence that to melt together oxide of manganese and carbonaceous matter with steel and iron will serve as an equivalent for the melting together of carburet of manganese with steel or iron in producing the desired result. * But there is no evidence that, at the time of the * 523 patent and specification, this was known to persons of

ordinary skill in chemistry. And I fully agree with the doctrine which has been repeatedly laid down in the course of the discussion of this cause, that though the use of a chemical or mechanical substitute, which is a known equivalent to the thing pointed out by the specification and claimed as the invention, amounts to an infringement of the patent, yet if the equivalent were not known to be so at the time of the patent and specification, the use of it is no infringement.

But if the invention described and claimed by the patentee in this case is not the particular process specified, but the employment of carburet of manganese in the process of the conversion of iron into steel, and if the description of the process in the specification, instead of being a description of the invention, is only a description of one mode of carrying the invention into effect, an entirely different doctrine becomes applicable to the question, viz., the doctrine that if a patent is taken out for the application of a principle, coupled with a mode of carrying the principle into effect, the patentee is entitled to protection from all other modes of doing so, whether known or not known at the time of the specification. And I am of opinion that the latter is the true view of the invention described and claimed by the patentee in this case.

If so, there can be no room for doubt that there is evidence of an infringement of the patent. For there is evidence that the oxide of manganese and carbonaceous matter, as used by the plaintiff in error in the manufacture of cast steel, formed in the crucible, by the action of the heat, a carburet of manganese before the steel or iron began to melt, and that subsequently, when the steel or iron melted, the carburet alloyed itself therewith, producing thereby the improved cast steel ; and that
 * 524 in this * way carburet of manganese was employed in the process used by the plaintiff in error for converting steel or iron into cast steel in order to procure an improved cast steel.

For these reasons, I beg to answer your Lordships' question in the affirmative.

MR. BARON PLATT. — The patentee claimed under his patent, for himself and his licensees, the exclusive use of carburet of manganese in any process whereby iron is converted into cast steel.

The substance, of which he has so claimed the exclusive use, in an improved manufacture of cast steel, was a well-known chemical body, having a distinctive appellation descriptive of its component parts.

Persons of humble chemical acquirements would know that carburet of manganese resulted from the combination of oxide of manganese with carbon; and finding by experiment that the constituent parts placed together in a crucible with iron would form their combination before the iron was ready for their united action, might readily hit upon the expedient of collecting in the crucible oxide of manganese, carbonaceous matter, and the steel, submitting the whole to the same heat, and thus, while the fusion of the steel was proceeding, manufacturing and preparing for action contemporaneously in the same pot the carburet of manganese, and afterwards continuing the carburet in a state of fusion, and using it while in that state in a process whereby iron was converted into cast steel.

Was there evidence of such a state of circumstances? Such evidence appears to me to have been presented by the testimony of Thomas Bevins, Robert Warrington, John Thomas Cooper, Andrew Ure, and William Thomas Brande. Their testimony concurred to establish that the effect of introducing into the crucible oxide of manganese and carbonaceous * matter * 525 with the steel was the same as that produced under Heath's patent; that neither the carbonaceous matter nor the oxide of manganese alone would produce the desired result on the steel; and that in the operation they must have combined, and in their combined state of carburet of manganese alone produced that result.

If, instead of putting into one crucible the carbonaceous matter, the oxide of manganese, and the steel together, the plaintiff in error had first submitted to the action of heat the carbonaceous matter and the oxide of manganese, and so produced the combined body, carburet of manganese; and in a second operation used this carburet on the improved manufacture of cast steel, that second operation would have been an infringement of the patent.

Does it become less an infringement because Mr. Unwin manufactures, while the steel is undergoing the process of fusion, the carburet in the same pot? If a dyer had discovered that the use of sulphate of soda, in preparing fluids for dyeing silken, woollen,

or cotton fabrics, improved the brilliancy of colour, and promoted economy in the exercise of his art; and the invention being new, he obtained a patent for the improvement; could any other person, without infringing the dyer's patent, afterwards prepare the same fluids for the same purposes, and in doing so, instead of adding the sulphate of soda, add the sulphuric acid and soda separately? Could he say, that although true it is that my result is precisely the same, yet as I mixed with the fluid soda and sulphuric acid separately, leaving them to the consequences of their natural affinities, and did not use both together in their combined form of sulphate of soda, I have not infringed the right of the patentee under his patent?

The Judges in the Court of Exchequer, in giving judgment in *Heath v. Unwin*,¹ after observing that the specification * 526 * was expressly for the employment of carburet of manganese, seem to have relied on the putting a certain quantity of it in an unmelted state into the crucible, as being the particular mode of using it in pursuance of the patent. According to this narrow construction, Unwin would not have been guilty of an infringement by using the carburet, provided he poured it in a molten state into the crucible containing the iron. The patent, however, as explained by the specification, cannot be so limited. The use of the carburet, whether introduced into the crucible in an unmelted or in a molten state, or actually composed in the pot containing the steel, would, as it seems to me, fall equally within the protection of the letters patent, which granted a monopoly of the general use in a particular branch of the manufacture of steel. *Ad questionem facti non respondent Judices; ad questionem legis non respondent Juratores.* It was not for the Judge, but for the jury, to decide whether the deductions of chemical science, warranted by investigation and experience, were the results of mere conjecture, or were so justified by sound reason, applied to the consideration of Unwin's mode of conducting the process of converting iron into cast steel, and of the well-known properties of the bodies selected for so conducting it, as to enable them safely to conclude that Unwin had in that process used carburet of manganese. Mr. T. Cooper, in giving his testimony, states as facts, that the carbon of the tar and the oxide of manganese would fuse before the steel; that the oxide, unless diverted from its action on the pot, would

¹ 13 M. & W. 583.

break it ; that the oxide did not act upon the pot ; that the action of the carbon on the oxide would prevent its doing so, and that the mutual action of the carbon and the oxide on each other in a state of fusion, would elaborate carburet of manganese. Putting together these facts, and adding to them the identity of the improvement effected in the cast steel by the operation * of * 527 Unwin, and by the operation of Heath, and the knowledge that the use of carburet of manganese alone had up to the time of the witness's appearance at the trial effected that improvement, any one acquainted with the rudiments of chemistry would reasonably conclude that the result of fusing together in the same pot carbonaceous matter and oxide of manganese must be carburet of manganese ; that in Unwin's operation this compound body was ready to operate on the iron as soon as that metal was melted, and was, in truth, then used in the process of converting the iron into cast steel.

The patent was not for introducing into the crucible with the steel any certain body or bodies, or such body or bodies in a prescribed state, but for using the carburet of manganese, however formed, in the process of the contemplated conversion. The use really begins as soon as, and not before, the carburet and the iron are both in a state of fusion. Whether the plaintiff in error directly or indirectly used the carburet of manganese in a process, whereby iron was converted into cast steel, was surely a question of fact. The affirmative of that question seems to me to have been supported by the testimony of the witnesses to whom I have already alluded.

To the question, therefore, proposed by your Lordships, I answer, in conformity with the opinion expressed by me in the Exchequer Chamber, that, in my judgment, there was such evidence.

MR. JUSTICE ERLE. — My answer to your Lordships' question is in the affirmative. The patent is for the employment of carburet of manganese in the manufacture of cast steel, not for a mode of making that carburet, and there is evidence to prove that the defendant, by heating the elements of carburet of manganese with iron, formed first the carburet and then cast steel.

* If the evidence satisfied the jurymen of this fact, it * 528 would satisfy them that the defendant used carburet of

manganese in the manufacture of cast steel, and so directly infringed the patent. Thus there was evidence for the jury of a direct infringement.

Further, I am of opinion that if the jurors were not satisfied that carburet of manganese was formed in the process used by the defendant, and so were not satisfied of a direct infringement, still there was evidence from which they might find that he had indirectly infringed this patent for the use of a substance in a process, by the use of the elements of that substance in that process, which elements were known to be equivalent, chemically, to the substance itself in that process.

At the time of the patent the patentee made the carburet by heating the carbon and manganese till the carburet was formed; he then used the carburet by heating it with the iron till the cast steel was formed. He afterwards discovered that if these elements of the carburet were heated with the iron the same result would be obtained, and one heating would be saved. He communicated the effect of this discovery to the defendant by selling to him a packet containing these elements of the carburet to be so used. And the patentee knew at the time of the patent these to be the elements from which he formed the carburet, and from that knowledge was induced to use these elements as equivalent to the substance mentioned in the specification. There is, thus, evidence that the defendant infringed the patent by the use of the elements of the patented substance which were known at the time of the patent to be equivalent to that substance.

I am also of opinion, that a patent for the use of a substance in a process is infringed by the use of the elements of that substance known to be equivalent thereto at the time of the

* 529 use, if used for the purpose of taking the * benefit of the patent and of making a colourable variation therefrom. Taking the instance put in the argument in this case in the Exchequer, if a patent was for the use of soda in a process, and by subsequent analysis sodium and oxygen were discovered to be the elements of soda, and equivalent thereto in the process in question, the use of sodium and oxygen in the patented process for the purpose of being equivalent to soda in that process, would appear to me to be an infringement, although the analysis of soda was subsequent to the patent. In like manner, if the discovery had been made after the patent, that carbon and manganese were

elements of the carburet, equivalent to the carburet of manganese in the patented process, the use of those elements in that process for the purpose of being equivalent to the carburet, would, in my judgment, be a colourable variation, and an infringement.

MR JUSTICE CRESSWELL. — I am of opinion that there was evidence for the jury that the plaintiff in error was guilty of an infringement of the patent stated in the declaration, by using oxide of manganese and carbonaceous matter in the manufacture of cast steel in the manner in which, according to his admission at the trial, he did use them.

It was admitted on the trial that the defendant had, since the date of the patent, manufactured cast steel by using oxide of manganese and carbonaceous matter introduced into the pot at the same moment with the steel, and several scientific witnesses gave their opinion that the oxide of manganese and carbonaceous matter so introduced would first form a carburet of manganese, which would as soon as formed enter into combination with the steel, and that the oxide of manganese would not combine with the steel, until it had first formed a carburet by union with the *car- *530 bonaceous matter. It seems to me, therefore, that there was evidence for the jury of the defendant having used carburet of manganese in the manufacture of cast steel.

If the plaintiff had claimed only the particular method of using a carburet of manganese in the manufacture of steel, which is described in his specification, I should have thought that the process adopted by the defendant had not infringed his patent right; but his claim was general to the employment of carburet of manganese in preparing an improved cast steel, although he also described, as indeed he was bound to do, the mode in which he proposed to use it. The claim being general, and the evidence in support of the action tending to show that the defendant had used carburet of manganese in the manufacture of steel by causing it to be first formed in the pot and afterwards mixed with the steel, I think the case is not one where an equivalent has been used, but the thing itself; and if the thing itself was used, although the defendant was not aware of it, he has still infringed the patent.

In *Stevens v. Keating*, as set out in the printed cases, it appears that the plaintiff took out a patent for making cement by uniting

manganese in the manufacture of cast steel, and so directly infringed the patent. Thus there was evidence for the jury of a direct infringement.

Further, I am of opinion that if the jurors were not satisfied that carburet of manganese was formed in the process used by the defendant, and so were not satisfied of a direct infringement, still there was evidence from which they might find that he had indirectly infringed this patent for the use of a substance in a process, by the use of the elements of that substance in that process, which elements were known to be equivalent, chemically, to the substance itself in that process.

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I am also of opinion, that a patent for the use of a substance in a process is infringed by the use of the elements of that substance known to be equivalent thereto at the time of the * 529 use, if used for the purpose of taking the * benefit of the patent and of making a colourable variation therefrom. Taking the instance put in the argument in this case in the Exchequer, if a patent was for the use of soda in a process, and by subsequent analysis sodium and oxygen were discovered to be the elements of soda, and equivalent thereto in the process in question, the use of sodium and oxygen in the patented process for the purpose of being equivalent to soda in that process, would appear to me to be an infringement, although the analysis of soda was subsequent to the patent. In like manner, if the discovery had been made after the patent, that carbon and manganese were

elements of the carburet, equivalent to the carburet of manganese in the patented process, the use of those elements in that process for the purpose of being equivalent to the carburet, would, in my judgment, be a colourable variation, and an infringement.

MR JUSTICE CRESSWELL. — I am of opinion that there was evidence for the jury that the plaintiff in error was guilty of an infringement of the patent stated in the declaration, by using oxide of manganese and carbonaceous matter in the manufacture of cast steel in the manner in which, according to his admission at the trial, he did use them.

It was admitted on the trial that the defendant had, since the date of the patent, manufactured cast steel by using oxide of manganese and carbonaceous matter introduced into the pot at the same moment with the steel, and several scientific witnesses gave their opinion that the oxide of manganese and carbonaceous matter so introduced would first form a carburet of manganese, which would as soon as formed enter into combination with the steel, and that the oxide of manganese would not combine with the steel, until it had first formed a carburet by union with the *car- *530 bonaceous matter. It seems to me, therefore, that there was evidence for the jury of the defendant having used carburet of manganese in the manufacture of cast steel.

If the plaintiff had claimed only the particular method of using a carburet of manganese in the manufacture of steel, which is described in his specification, I should have thought that the process adopted by the defendant had not infringed his patent right; but his claim was general to the employment of carburet of manganese in preparing an improved cast steel, although he also described, as indeed he was bound to do, the mode in which he proposed to use it. The claim being general, and the evidence in support of the action tending to show that the defendant had used carburet of manganese in the manufacture of steel by causing it to be first formed in the pot and afterwards mixed with the steel, I think the case is not one where an equivalent has been used, but the thing itself; and if the thing itself was used, although the defendant was not aware of it, he has still infringed the patent.

In *Stevens v. Keating*, as set out in the printed cases, it appears that the plaintiff took out a patent for making cement by uniting

gypsum with an acid and an alkali ; the defendant made cement by uniting gypsum with borax. It was discovered that borax was composed of an acid and an alkali, and Lord Cottenham held that the use of it was therefore an infringement of the patent.

And, in the case of *Neilson and Others v. Harford and Others*, as reported by Mr. Webster,¹ Mr. Baron Parke used this language :

“ If the specification is to be understood in the sense claimed by the plaintiffs, the invention of heating the air between its leaving

the blowing apparatus and its introduction into the furnace

* 581 in any way in any * close vessel which is exposed to the action of heat, there is no doubt that the defendant's machinery is an infringement of that patent, because it is the use of air which is heated much more beneficially, and a great improvement upon what would be the machine constructed by looking at the specification alone ; but still it is the application of heated air heated in one or more vessels between the blowing apparatus and the furnace.”

So in the present case, the claim made and specified by the plaintiff below is “ the use of carburet of manganese in any process whereby iron is converted into steel,” and is not limited to the precise mode of using it described in the specification, there was evidence for the jury that the defendant below had used (although in a more beneficial manner) carburet of manganese in a process whereby iron was converted into steel, and therefore that the patent of the plaintiff below had been infringed. I cannot distinguish the principle upon which the cases cited on this point proceeded from that which is involved in this case. I feel therefore bound to say, that in my judgment there was evidence for the jury that the plaintiff in error was guilty of an infringement of the patent right of the plaintiff below.

MR. JUSTICE WIGHTMAN. — Upon a careful reconsideration of this case, I have not found any reason that has appeared to me sufficient to alter the opinion upon it which I have already expressed in the Court of Exchequer Chamber. I am therefore of opinion, as before, that there was evidence for the jury that the plaintiff in error was guilty of an infringement of the patent. And for my reasons for arriving at this conclusion, I beg permission to refer to the opinion I have already given in the Court below.

* MR. JUSTICE MAULE. — My Lords, I am of opinion that * 582 there was not evidence for the jury that the plaintiff in error was guilty of an infringement of the patent by using oxide of manganese and carbonaceous matter in the manufacture of cast steel, in the manner in which, according to his admission at the trial, he did use them.

That part of the plaintiff's invention, the infringement of which is complained of, is in effect described in the specification as a method of making an improved quality of cast steel, by introducing into a crucible the ordinary materials from which cast steel is produced, "together with from one to three per cent. of their weight of carburet of manganese," the rest of the process, melting, &c., being the same as that in common use for making cast steel. The specification then proceeds to disclaim as part of the invention the use of such ordinary materials, and restricts the claim to "the use of carburet of manganese in any process for the conversion of iron into cast steel."

The act complained of as an infringement is the use of oxide of manganese and carbonaceous matter by putting them into the pot or crucible with the ordinary materials, and then conducting the process in the known and usual manner. The question whether this is an infringement depends on whether the defendant can properly be said to have used carburet of manganese in the sense in which the use of that substance is claimed by the patentee, that is, either in the precise manner described by him in his specification, or in any manner substantially the same.

It was contended for the plaintiff that the process of the defendant was substantially the same as that which the plaintiff had patented. Looking at the two processes as above described, without reference to any evidence * respecting them, there * 533 would be no doubt that the defendant had not infringed the patent. The plaintiff claimed the use of carburet of manganese, the defendant used oxide of manganese with carbonaceous matter, very different substances from the carburet of manganese both in respect of their chemical character and their price, — the defendant producing the same result at a much cheaper rate than the plaintiff.

But several witnesses were called for the plaintiff, who gave evidence of their opinion that carburet of manganese was formed in the defendant's process before the steel melted. They appear

to have inferred this from the result of these two processes being the same ; and from the fact that carbon and manganese, the substances of which carburet of manganese is a combination, are present in the carbonaceous matter, and the oxide of manganese, though in combination with other substances, and particularly (as regards the oxide of manganese) with oxygen, certain decompositions and combinations taking place during the process which resulted in the production of carburet of manganese before the conclusion of the process. Whether this is a correct theory is not now in question. There was certainly evidence such as should have been submitted to a jury of the formation of the carburet of manganese in the defendant's process, if that would show that the defendant had used carburet of manganese so as to infringe the patent ; but it appears to me that on the assumption that carburet of manganese was formed in the defendant's process in the manner described by the witnesses, there was no use of carburet of manganese by the defendant so as to constitute an infringement of the patent.

The whole process of the plaintiff, so far as it is new, consists in putting carburet of manganese into the pot with the usual * 534 articles from which cast steel is produced ; and * the whole of the defendant's process consists in a similar use of a mixture of carbonaceous matter and carburet of manganese. All the rest of both processes consists in treating the substances operated on in the way commonly used by manufacturers of cast steel. It seems to me that a person employing the defendant's process cannot, with any propriety, be said to have used, or have had, or possessed, any carburet of manganese ; any carburet of manganese which he has or uses is, according to the theory of the witnesses, which must be supposed to be true, formed and mixed in a fluid state among the substances in a crucible at a great heat. Whether it could possibly be extricated in a separate state from the crucible does not appear, but it is certain that in the defendant's process no carburet of manganese is put into the pot and none taken out.

It may be remarked that the defendant's process does not consist, as it sometimes has been assumed to do, of putting into the crucible two simple substances, which in their combination would produce carburet of manganese, but is of a much more complicated description, and, according to the evidence, particularly that of Mr. Cooper and Mr. Ure, oxide of manganese by itself would be

destructive : when melted, it would combine with the earth of the crucible or pot and form a glass, and so make holes in the crucible and render it unserviceable ; and the oxygen of the oxide would also destroy the steel, by combining with it and converting it into an oxide of iron ; but when the oxide of manganese is accompanied by carbonaceous matter, the mischief is prevented by means of the whole of the oxygen of the oxide combining with the carbon in the carbonaceous matter, and being carried off in the form of oxygen gas, so that there is no melted oxide to combine with the earth of the pot, and no oxygen to * combine with and * 585 oxidize and spoil the steel ; but the metal of the oxide, that is, the manganese, combines with some of the carbon, and then acts on the steel in the same manner as if carburet of manganese had been introduced at the beginning of the process. Supposing this theory to have been formed by the inventor of the defendant's process, and to have led him to it, he would have formed a very bold and ingenious conjecture ; and when experiment proved that the result was such as was expected, it would show him to have discovered a valuable process, much more valuable than and totally different from that of putting carburet of manganese into the pot. The theory shows why and in what manner the defendant's process produces the same result as the plaintiff's, by indicating a series of decompositions, and new combinations taking place in a certain order after the defendant has done all that the novelty of his process consists of. This theory may account for the identity of the results, but does not show that they are arrived at by the same process ; and certainly fails to prove the identity in form or substance of what the defendant does when he puts oxide of manganese and carbonaceous matter into the pot, with what the plaintiff does when he puts carburet of manganese into it.

MR. BARON PARKE. — In answer to the question proposed by your Lordships, I have to say that in my opinion there was no evidence of infringement to be submitted to the jury.

It must be assumed, in answering the question, that the bill of exceptions states sufficient evidence for the jury, viz., the opinions of scientific persons, that carburet of manganese was formed in the process of melting in the crucible, and then combined with the steel in a state of fusion ; and the question is, whether this is such a use of * carburet of manganese in the manufac- * 586

ture of cast steel as to be within the specification. This depends upon the meaning of that specification.

If it meant as argued at your Lordships' bar, to comprise every method of making cast steel, so that carburet of manganese, in any state or condition, should be present during the process, there would be, doubtless, evidence of an infringement of the patent. Whether such a specification would be good, as describing sufficiently such a patent right, or whether a patent could be granted for such a right, is another question, not necessary to be considered in answering your Lordships' question. But I am of opinion that the patent, as explained by the specification, is not so extensive.

The language of the specification, in the part on which this question arises is as follows: — [His Lordship read it.]

It is clear, in my opinion, that the patent, explained by the specification, is for the use of the metallic substance called carburet of manganese already formed by a previous process (whether by the same person who manufactures the steel, or bought by him from another, as an article of commerce, is immaterial), a tangible substance existing in the state of carburet of manganese, and capable of being weighed as such, before it is placed in the crucible. It is for the use of such a substance only.

The plaintiff in error has certainly not used any carburet of manganese, so understood, in any way either directly or indirectly. He has used materials which, during the process, are to be assumed to form for a time a substance in a state of fusion formed of carbon and manganese, and therefore properly termed carburet of manganese; but that is not the use of such carburet of manganese, nor in such a state, as is intended by the specification, and which alone the plaintiff's patent protects.

This the specification distinctly expresses. The substance * is pointed out, and the mode of using it, by putting a certain quantity, by weight, of that substance in an unmelted state, into the crucible. It is impossible to express the intention of the patentee in more distinct words. I am, therefore, clearly of opinion that there is no evidence of a direct invasion.

And I think, also, that there is no evidence of an indirect infringement of the patent. There was certainly no intention to imitate the patented invention, for it is not stated that the defendant knew, nor does it appear that any one knew before the patent,

nor indeed before the alleged infringement, that the mixture of oxide of manganese and coal tar would, in the course of fusion, form carburet of manganese, and in that state combine with the steel.

In delivering the judgment of the Court of Exchequer in a former stage of this case,¹ I stated the opinion of the Court to be, that there could be no indirect infringement if the defendant did not intend to imitate at all. That part of the judgment has been since justly objected to, in *Stevens v. Keating*,² and in *Heath v. Unwin*, in Chancery,³ and no doubt we were in an error in that respect. There may be an indirect infringement, as well as a direct one, though the intention of the party be perfectly innocent, and even though he may not know of the existence of the patent itself. But though this position may be erroneous, I am still of opinion that there was no indirect infringement of the plaintiff's patent.

The patent being for the use of the substance, carburet of manganese, and the mode described being the putting into the crucible a definite quantity of that substance with the steel, it would be an indirect infringement to use that substance in a separate distinct state, before or after * the steel and carbonaceous * 588 matter was put in, or in a subsequent part of the process. There is no evidence of such an infringement.

But I am clearly of opinion that the use of oxide of manganese and coal tar, in the manner adopted by the defendant below, still less by the use of highly carburetted steel, is no indirect infringement. If it were an indirect infringement of this patent to use known chemical equivalents, I think there is no evidence of such infringement, in the proper signification of those words.

I entirely agree with the opinion expressed by my brothers Alderson and Coleridge, in delivering their judgment in the Exchequer Chamber in this case.

The specification must be read as persons acquainted with the subject would read it at the time it was made; and if it could be construed as containing any chemical equivalents, it must be such as are known to such persons at that time; but those which are not known at the time as equivalents, and afterwards are found to answer the same purpose, are not included in the specification. They are new inventions.

¹ 13 M. & W. 593.

² Not reported.

³ 15 Sim. 552, where *Stevens v. Keating* is referred to.

Now, there is no evidence whatever that oxide of manganese and carbon were known at the time of the specification (which I agree with my two learned brothers, Alderson and Coleridge ; *Heath v. Unwin*,¹ is the true time to be looked to, and not the time of the use of them) to be an equivalent, for the purposes of the process, to the use of carburet of manganese, or that they would form carburet of manganese at that stage, which appears to have been essential to the operation, and have the same effect, as in the relative quantities, as stated in the specification. In order to form evidence of an infringement of the patent, it was essential * 539 to prove such knowledge by competent * persons at the time of the patent, and not since. All this is a subsequent discovery, for which the plaintiff below might have taken out a patent, but it is not included in this patent.

I will add, that even if the use of oxide of manganese and carbon had been known to be a chemical equivalent at the time of the specification, I think that this specification would not include it, for the mode of user is confined to the particular substance, carburet of manganese, in an unmelted state, and consequently that there would have been no infringement. But assuming it to have been unknown at the time of the patent, I think it clear, it is not one. In order to make it so, it was essential for the plaintiff below to have shown, not merely that it is now known to chemists that the two substances form the substance which is the subject of the patent, but that it was so known at the time of the specification. I am therefore clearly of opinion that there was no evidence of infringement to be submitted to the jury.

MR. BARON ALDERSON. — My Lords, I have already given my opinion in this case, as it appears in the report of the case in the Court below. I entertain the same opinion still, and I have no reasons worthy of your Lordships' attention to support that opinion in addition to those which I have already given.

LORD CHIEF BARON POLLOCK. — In answer to the question proposed by your Lordships to the Judges, I am of opinion, that, looking at the record as set forth in the joint appendix to the printed cases, there was no evidence for the jury that the plaintiff in error was guilty of an infringement of the patent stated in the

¹ 12 C. B. 522.

declaration, by using oxide of manganese and carbonaceous * matter in the manufacture of cast steel, in the manner in * 540 which, according to his admission at the trial, he did use them.

The first question that presents itself is, what is the plaintiff's invention? What has he discovered? or rather, what invention, discovery, or process is protected by the patent? To solve this, we must look at the title and specification of the patent. Strictly speaking, nothing is protected by the patent that is not found in the specification, either directly expressed in terms, or reasonably to be inferred from what is so expressed, by persons skilled in the subject to which the patent relates. The right of the plaintiff does not turn upon the extent of his claim, but upon the communication made to the public as to the mode of accomplishing his object; and he has no right to claim any thing but that which he has communicated to the public, however large in point of language his claim may appear to be.

The title of the present patent, like most others, merely states in very general terms to what subject it relates, and as usual, communicates as little as possible beyond that matter. It is in the specification (which, while it creates, also limits the rights of the patentee under the patent) that we must look for the true extent of those rights.

The present invention has four points; but it is with the fourth alone that we have to deal, and upon which any question arises. That is stated in the specification to be, "Fourthly. The use of carburet of manganese in any process whereby iron is converted into cast steel." This statement does not in my opinion give to the patentee, as some of my learned brothers seem to think, the exclusive right of using carburet of manganese in any and every possible process, or in any and every mode of using it, in order to convert iron into cast steel; but it only gives to * the * 541 plaintiff such an exclusive right as regards such process or processes as he afterwards further describes, declares, and makes known for the benefit of the public, and such other similar processes as are reasonably within the description, according to the then state of knowledge; also he is protected against fraudulent imitations, or evasions of, or substitutions of equivalents in his process or processes as specified. And the process he gives to the public, and which is the process protected by the patent, is mixing

from one to three per cent. of carburet of manganese with fragments of common blistered steel or mixtures of cast and malleable iron, &c., &c.

Now the defendant does not use carburet of manganese at all. He seeks to obtain the result by a process obviously not the same as the process stated in the specification. It is not described there, and it is not to be inferred from the description that it is to be found there, according to the then state of knowledge at the date of the patent. There is, therefore, clearly no direct infringement of the patent.

Then is there any fraudulent imitation, or evasion, or substitution of a chemical equivalent, so as to create an indirect infringement of the patent? There is no evidence of fraudulent imitation or evasion. It is not suggested that there is any such; and it has not been suggested by any of the counsel that the case can be put upon that ground. And as to the substitution of an equivalent, I entirely agree with my brothers Alderson and Coleridge (referring to their judgments as given in the Court of Exchequer Chamber),¹ that the patent (as explained in the specification) covers and protects not only the process actually specified, but any process with chemical equivalents known as such at the date of the patent, but not chemical equivalents discovered afterwards; for

this would be giving the patentee not only the benefit of his * 542 own discovery, but the benefit of * the discoveries of other persons subsequently to the date of the patent. The process used by the defendant was not known as a chemical equivalent at the date of the patent. If it was known, the plaintiff was guilty of a fraud on the public in concealing it, and in omitting to mention it as a better and cheaper method of accomplishing his object. But, as against the plaintiff, it must be taken that it was not known; and, indeed, the evidence clearly shows that it was not known. Then, assuming it to be a chemical equivalent (which after all is only matter of conjecture, by chemical witnesses speculating what may occur in the inside of a red-hot crucible), it is not a chemical equivalent that was known to scientific persons at the date of the patent, and it stands therefore on the footing of an entirely new discovery, and therefore the use of it is not an indirect infringement of the plaintiff's patent. The consequence

¹ 12 C. B. R. 522.

is, there is no evidence of any infringement of any sort, direct or indirect.

I would, however, add (as has been already mentioned by one of my learned brothers), that it appears to me a very incorrect expression to speak of the defendant's process as the substitution of a chemical equivalent. The defendant does not use the plaintiff's process substituting a chemical equivalent for that which the plaintiff uses, but he appears to me to use a different process altogether.

July 31.

THE LORD CHANCELLOR (after stating the facts of the case) said. — The only plea that we need consider is the plea of Mr. Unwin of Not Guilty; that is, that he has not infringed the letters patent. The question is, whether there was evidence that the defendant did infringe that part of the plaintiff's invention which is stated in the last paragraph of the specification.

Carburet of manganese is a metallic substance, stated by one of the witnesses to be of the value of 7s. or 8s. * per * 548 pound. There was no evidence that this substance was ever used by the defendant; indeed it certainly was not. But there was evidence, or rather it was admitted by him, that he did use oxide of manganese and carbonaceous matters. The question is, whether what he thus did was substantially the use of the substance described in the specification as carburet of manganese.

The evidence showed that carburet of manganese was produced by lining melting pots with charcoal, mixing oxide of manganese with coal tar, then putting it into the pot and exposing it to excessive heat. There was evidence to show that, for a short time after the date of the patent, the plaintiff below used the carburet of manganese in the manufacture of steel in the mode described in his specification, but that it was soon discovered by his workmen that the same result might be obtained by using, instead of the carburet of manganese, the substance by means of which that carburet was obtained; i. e. by placing in the melting pot, together with the steel, while it was in the process of being melted, a paste made with coal tar and oxide of manganese. The evidence went further to show that the chemical effect of this use of the paste would be to generate, in the process of melting, carburet of manganese in a fluid state, which would then unite with the melted or

melting steel, and so produce results the same as those which had flowed from the use of the carburet itself. The witnesses stated, that after this discovery had been made, the use of the solid metallic carburet was altogether discontinued. It was obvious that such must be the result, the cost of a pound of the paste being only about three farthings; and the process being, therefore, at once far less expensive and more simple. The substances which the defendant admitted he had used, namely, oxide of manganese and carbonaceous matter, were, in fact, the same as the paste used by the plaintiff. And the question, therefore, * 544 * was whether the use of the two substances of which the paste was composed was the same thing as the use of the carburet.

The learned Judge, at the trial, held that it was not, and therefore directed the jury that the evidence would not entitle the plaintiff to a verdict. To this direction the plaintiff excepted. And the bill of exceptions having been argued before the Court of Exchequer Chamber, four out of the six Judges by whom the case was heard disagreeing with the law as laid down at the trial, the exceptions were allowed, and a *venire de novo* was awarded.

The defendant below then brought the matter, by writ of error, to this House. And the question was elaborately argued at the close of the last session of Parliament at your Lordships' bar, when we had the assistance of eleven of the Judges, whose opinions have been printed, and are now before your Lordships. Seven of the Judges concurred with the judgment of the Exchequer Chamber, and four disagreed. Mr. Justice Coleridge, one of the two Judges who were in the minority in the Exchequer Chamber, was not present at the whole of the argument in this House, and we are not, therefore, able to say whether he would have adhered to his former opinion or not. In this conflict of opinion the duty devolves upon us of finally deciding the question, and my judgment, after anxiously considering the case, coincides with that of the minority of the learned Judges.

The invention for which the patent was granted was, according to the language of the specification, a mode of "making an improved quality of steel, by introducing into a crucible bars of common blistered steel, along with from one to three per cent. of their weight of carburet of manganese." It is certain that this process was not adopted by Unwin. He never used such a

substance as carburet of manganese at all. And if, therefore, what he did * amounted to a violation of the patent, * 545 it must be because he used a substance, or a combination of substances, which in the process of fusion generated carburet of manganese, so that he, indirectly, though not directly, used the substance on the use of which the plaintiff's invention was founded.

It must, I think, be assumed that in the course of the process adopted by the defendant, carburet of manganese, in a liquid state, was generated. There was evidence from which the jury might reasonably infer such to be the case, and if the use of substances thus producing carburet of manganese in a state of fusion was a violation of the plaintiff's patent, the learned Judge at the trial ought not to have told the jury, as he did, that there was no evidence on which they could find a verdict for the plaintiff.

But I think that the use of substances thus producing carburet of manganese in a state of fusion was no violation of the patent. The substance for the use of which (*inter alia*) the patent was granted, was a solid metallic substance capable of being broken into fragments and weighed, so that certain definite quantities might be put into the crucible with the steel. There is no evidence whatever tending to prove that, at the date of the patent, it was known to persons acquainted with the subject of manufacturing cast steel, that coal tar and oxide of manganese would be chemical equivalents for the carburet of manganese claimed by the plaintiff. Indeed it is obvious that the discovery of such equivalents was made after the use of the carburet, as a distinct metallic substance, had been some short time in operation. It was itself a most valuable discovery, and would have legitimately formed the subject of a new patent. The costly nature of the substance claimed in the patent might, and probably would, have prevented its use altogether; and, if at the date of the specification, it was known to the plaintiff that, by the use of two common substances * well known in commerce, more than * 546 one hundredfold cheaper than carburet of manganese, the same results precisely would be obtained as by the use of that material, the specification would have been bad, as not truly disclosing the invention.

On the short ground, therefore, that the invention claimed is

for the use of a particular metallic substance, namely, carburet of manganese, in certain definite proportions, according to the weight of the steel under fusion, and that no such substance, nor any equivalent for it, known to be such at the date of the specification, was used by the defendant, I think that there was no evidence of infringement, so that the ruling of the learned Judge at the trial was correct. I therefore think that there ought to be judgment for the plaintiff in error, and I shall move your Lordships accordingly.

LORD BROUGHAM. — My Lords, in this case the question was respecting the infringement of a patent, the specification of which, taken with the patent itself (specification, as one of the learned Judges observed, generally gives as little information as possible, prior to the publication), showed that the invention, the infringement of which is complained of in the action now brought to your Lordships' bar, consists of exposing, with one to three per cent. of their weight of carburet of manganese, fragments of iron, in a crucible, at the proper heat for melting the materials, and the disclaimer of the patentee states that he does not "claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention; but only" (and here is the gist of the invention as specified) "the use of carburet of manganese in any process for the conversion of iron into cast steel." Then he proceeds, in the last place, to * 547 claim the * employment of carburet of manganese in preparing an improved cast steel.

The question, therefore, is whether there was here evidence to go to the jury, of the right granted by this patent having been infringed by the plaintiff in error, by the use, not of carburet of manganese, but of oxide of manganese and carbon, which it is contended was equivalent to using carburet of manganese, inasmuch as carburet of manganese is admitted to be a compound of carbonaceous matter (or call it carbon) and manganese, and oxide of manganese, containing manganese, and carbon exhibited to that oxide of manganese, and uniting with the manganese, forming carburet of manganese, it is contended for the plaintiff below, the defendant in error here, that the employment of carbon, or rather of carbonaceous matter (for when we speak of carbon, we speak of an ideal substance rather than of any matter actually existing in

nature), the employment of carbonaceous matter, of matter containing the carbonic principle in combination with oxide of manganese, says the evidence (upon which I shall say a word presently), at the instant of fusion, at the instant of the entering of the iron into composition with the other matters, forms carburet of manganese. And this, it is said, is equivalent to the employment of carburet of manganese in the process, and consequently is an infringement of this patent. The question is whether that ought to have gone to the jury as evidence of the infringement of the patent. I am of opinion that it ought not so to have gone to the jury, because it was not an infringement of the patent.

I agree with what my noble and learned friend has said as to the obligations we are under to the learned Judges, which would no doubt appear to be still greater, though not in reality so (for what I am about to say does not detract from the value of their opinion), if no such gross * error had occurred in the * 548 statement of the opinion of one of the learned Judges, as that of putting carburet of manganese (which is clearly a blunder), instead of oxide of manganese. In the printed opinions of the learned Judges, Mr. Justice Maule says: "The whole process of the plaintiff, so far as it is new, consists in putting carburet of manganese into the pot with the usual articles from which cast steel is produced; and the whole of the defendant's process consists in a similar use of a mixture of carbonaceous matter and carburet of manganese." Past all doubt, if this process consisted of a superfluous mixture, but still a mixture of carbonaceous matter with carburet of manganese, that would be an infringement of the patent. But it clearly must be meant, "a mixture of carbonaceous matter and oxide of manganese." It is perfectly absurd to suppose that it could mean any thing else. I mention that in passing, because it is doing great injustice to my right honourable and learned friend, Mr. Justice Maule, to suppose that he meant to state any thing so utterly inconsistent with his whole argument; probably it is the printer's mistake, the printer having put "carburet" instead of "oxide" of manganese.

Then the question is, whether that mixture of two substances, namely, carbonaceous matter, and oxide of manganese, out of which it is possible that carburet of manganese may be formed, and out of which, say some of the witnesses, scientific men, it is formed, in a crucible at the instant of the union of the matter of

iron with the other matters, at the instant, as it were, of the nascent state (if I may so speak, using a well-known chemical expression) of the compound of cast steel ; this mixture takes place, and carburet of manganese, say those witnesses, is formed. I confess that I very much lean towards the doubt upon this subject, which is expressed by the learned Chief Baron, who * 549 says, that he can hardly see * how those learned and experienced witnesses could look into the red-hot crucible, in order to discover that it was at this particular instant of time that the union took place, and that the materials of carburet of manganese did form actually carburet of manganese itself, so as to make it in fact true that carburet of manganese was formed in the melting pot, at the instant of the union of the ferruginous matter with the manganese.

But, however, I pass that by, because be that as it may, supposing it to be true, which I greatly doubt, that any one could form any satisfactory opinion upon it ; supposing it to be true, that *eo instanti* of the combination of the ferruginous matter with the manganese, carburet of manganese was formed by the fusion of those substances together, the carbonaceous matter, and the oxide of manganese, from which might come, and we will take it for granted did come, the materials of carburet of manganese, the union of these materials consequently making carburet of manganese in the operation ; I say be that so, admitting all this, and it is a somewhat liberal admission, in my apprehension, to the argument for the defendant in error, but admitting this in favour of the infringement, I still hold that there is here no infringement, for the process claimed is making cast steel by exhibiting to the iron in fragments, from one to three per cent. of carburet of manganese.

Now, as my noble and learned friend has well observed, carburet of manganese is a known substance ; it is a term of commerce, it is known in the shops as such, and it bears a particular price, a price exceedingly different from the price of the other articles now in question. But are you to hold as a general principle to be maintained, that whoever obtains a grant of a patent, a grant of a monopoly for the use in any process of any substance, is protected by that grant from any attempt on the part of * 550 any person, * or any successful process on the part of any person, to attain the same object by using not that substance

for the use of which he has obtained the patent, not that substance, the use of which in the process constitutes the subject of his monopoly, but the component parts or elements of that substance, those parts of which that substance when analyzed is found to consist, those parts out of which you might, synthetically, by a reversed process compound that substance, is it to be said that the patent right, the monopoly, extends to this, and that any use of the materials of which that substance may be compounded is therefore an infringement of the patent? I cannot go so far, nor do I see that any of the authorities cited go so far.

I come at once to the case which is chiefly relied upon, namely, *Stevens v. Keating*,¹ which came before Lord Cottenham, and in which the patent being for making cement by uniting gypsum with an acid and an alkali, the defendant made cement (which was the alleged infringement) by uniting gypsum with borax, and it being discovered that borax was composed of an acid and an alkali, Lord Cottenham held that uniting gypsum with borax was uniting gypsum with an acid and an alkali; and that consequently there was an infringement of the patent, which was granted for gypsum united with an acid and an alkali.

Now I will not at present, because I do not think it is at all necessary, express any doubts upon the soundness of the view there taken by Lord Cottenham. But I will ask what Lord Cottenham would have said if the converse had been the case; which would bring us nearer to the present question? What Lord Cottenham's judgment in such * a case would have * 551 been does not appear certainly upon the account that I have seen of the judgment on the case before him. But I very much question whether his judgment would have been in the affirmative upon the question of infringement or no infringement, if, instead of the patent having been for uniting gypsum with an acid and an alkali, the patent had been for making cement by uniting gypsum with borax; and it being found that borax was compounded of an acid and an alkali, it then had been contended that any compounding of an acid and an alkali was an infringement of the patent, inasmuch as the materials of borax being an acid and an alkali, and the patent being for combining an acid

¹ Not reported. Referred to Newton's London Journal, C. S. 62; Norman on Patents, 141. His Lordship granted the ordinary injunction, but the patent was afterwards held bad at law, 2 Exch. 772.

and an alkali with gypsum to make cement, therefore there was an infringement. In my opinion, the proposition affirmed by Lord Cottenham in this decision would not at all lead by any necessity whatever to giving a similar decision upon the converse, where the case was such as I have just supposed.

Now, just let us consider how far this doctrine will hold. We will take an example. You might refer to almost any matter of chemical compound, every case of elective attraction, and more particularly any case coming near the present case of double elective exchange. You might refer to almost any one of these instances to illustrate it. I only refer to examples by way of illustration, and I am about to refer to instances perfectly notorious to all persons, however moderately acquainted with chemical science. Take this case. Glauber salts are a very well-known compound, now called sulphate of soda, composed of sulphuric acid (formerly called oil of vitriol) and soda. Suppose a patent had been taken out for the use of Glauber salts in the manufacture of any patent medicine; and suppose that instead of using Glauber salts, a person who was minded by a different process to arrive at the

*552 *same end, producing the same kind of medicine, had betaken himself to another process founded upon the fact of the composition of Glauber salts (being of that acid and that alkali), and supposing he had taken, I will not say an acid, though I might take the instance of an acid, but supposing he had described his newly invented drug as composed of soda and other materials (which we may take as analogous to the steel in this case), and that the other material of his drug had been ardent spirits, naphtha, or alcohol, or any other matter of that sort; and that he had exhibited sulphuric acid to such alcohol; in that case I should say, that although sulphuric acid exhibited to the mixture of alcohol and soda would lead probably to the formation of vitriolic ether, or sulphuric ether, in one respect, but would, there can be very little doubt in another respect, produce sulphate of soda, I do not think that this would have been an infringement of the patent. A very bad drug in all probability would be produced, and probably its use would give considerable confirmation to the jocosse answer once made by a friend of ours at the bar to a medical man who complained that he had been engaged in law proceedings, and said he did not find that our profession made angels of men. "Yes; but yours does," said the learned coun-

sel; "that is the difference between our professions." The one does not improve their character here, but the other, according to his idea, had a tendency to remove them hence to another state of existence. Probably this drug, which I am supposing to be made, would very much tend to produce that effect.

But I will now take another case, supposing, instead of exhibiting sulphuric acid to soda and alcohol, and thereby getting Glauber salts in one way or another, it had been an exhibition to alcohol of sulphuret of soda; that is to say, a compound of sulphur and soda; and that that sulphuret * of soda with * 553 the alcohol had been exposed to heat. I will suppose such a blast of hot air, or the flame of a blow-pipe driven upon the sulphuret of soda as should produce combustion of the sulphur, and consequently cause the formation of sulphuric acid, and the soda being present, of sulphate of soda. Can anybody say that this would have been an infringement of the patent, which was a patent for the exhibition of Glauber salts, merely because by the elective attraction of the substances exhibited to one another, the combustion of the sulphur had given rise to sulphuric acid, and the sulphuric acid had united with the soda and produced sulphate of soda, which is equivalent to Glauber salts? The answer to that argument would be, the patent is for Glauber salts. We know what Glauber salts are. We are told by this specification, that the process is to exhibit Glauber salts for making the medicine in question. The party wishing to use the invention, and to infringe it, or to do what was alleged to be an infringement of it, would have said: "No, I cannot use Glauber salts. I know that well enough; because the specification claims the exclusive use of Glauber salts. But I am not excluded from using soda. I am not excluded from mixing sulphur and soda together with alcohol, and combining them with the oxygen of the atmosphere in order to get sulphuric acid, and thereby to make something of the same sort as the medicine in question, I am therefore free to do that, though I am not free to use Glauber salts."

I will suppose the same thing precisely in another case, as to nitre. Suppose a patent for the invention of gunpowder. In the specification you would be directed to take so many parts of nitre, and so many parts of carbonaceous matter, and so many parts of sulphur, and mix them all together, and triturate. If a person, instead of doing this, were to use that out of which

* 554 nitre is made; * if he were to take some compound of potash, say muriate of potash (the old name of which I think was *sal febrifuge* of Sylvius), and he were to exhibit to muriate of potash, some substance which contains nitrous acid, the nitrous acid having a stronger affinity for potash than the muriatic acid has, would produce nitrate of potash. That is a single elective attraction. But you may suppose the case of a double elective exchange, by taking nitrate of ammonia, or some other composition of nitric acid with some other basis, and exhibiting that composition to muriate of potash, and thus by a double elective exchange you may make the nitric acid take possession of the potash, and precipitate the muriatic acid so as to create nitrate of potash. Would any one say that that was an infringement of a patent which consisted in using nitre, carbon, and sulphur? It is perfectly clear that it would be no such thing.

I am quite aware that with respect to all these cases which could be put, it might be said this is, to a certain degree, *idem per idem*. I deny that, I do not think it is so, but at all events, this tends to illustrate the proposition with which we are now concerned.

I have to add, my Lords, that in one or two observations of the Lord Chief Baron I entirely concur. I particularly speak of one in which I take precisely the same view with him, that is, his last remark upon chemical equivalents. I am of the same opinion with him, that the defendant does not use the plaintiff's process, substituting a chemical equivalent.

I am therefore very decidedly of opinion that this judgment cannot stand, as I must say, with the greatest respect for the learned Judges, I have been throughout the whole of the argument from the moment that I first apprehended what was * 555 the point under discussion at the bar. I never * could entertain any doubt, though I was a little shaken at first by the case before Lord Cottenham, to which I have adverted, till I come to look at it more closely; but even if it were necessary to overrule that case of *Stevens v. Keating*, I should be prepared to say that I do not go along with Lord Cottenham in his decision, but at the same time I am perfectly clear that it is not at all applicable to this case. I have expressed grave doubts as to its soundness; but I am equally, or more clear, that what he there laid down would not apply to this case, and ought not to weigh in the

decision here. Therefore I am clearly of opinion with my noble and learned friend, and, I am sorry to say, with the minority of the learned Judges, that this judgment cannot stand, but that judgment ought to be given for the plaintiff in error.

Judgment for the plaintiff in error.

Lords' Journals, 31st July, 1855.

TORRE v. BROWNE.

1854. July 17, 19. 1855. July 31.

B. S. TORRE, J. E. WALTERS, JANE CHARLOTTE CRACROFT, and ELIZA A. TORRE,	} <i>Appellants.</i>
MARIA BROWNE, S. STURGIS, R. EVERALL and REBECCA, his wife, ANN R. CRACROFT, E. D. BROWNE, AUGUSTUS BROWNE, and THE ATTOR- NEY-GENERAL, and the REVEREND R. W. P. DAVIES,	
	} <i>Respondents.</i> ¹

*Will. Surrender of Copyholds. Annuities. Arrear. Interest.
Costs. Practice.*

A testator was in 1792 possessed of freehold lands, and of an equitable fee in a copyhold estate. He made a will, by which he subjected the whole of his real estate in aid of his personalty, to the payment of his debts, and subject thereto, he gave all his "messuages, tenements, lands, hereditaments, and premises, with * the buildings, mines, &c.," thereon and therein, over which * 556 he had a disposing power, to trustees, for five hundred years, out of the rents, &c., or by assignment, &c., of the term, to raise money to pay his debts, legacies, and, after payment thereof, to apply the rents, &c., or the remainder of the estate, to the use of his grandson C. W. C., on his attaining twenty-three, and to raise 1000*l.* to pay to his other grandson R. C., on his attaining twenty-three. And in order that these two grandsons might be properly educated, the testator directed that the sum of 200*l.*, until C. W. C. should attain twenty-three, and 100*l.* afterwards, and till R. C. should attain twenty-three, should be raised for that purpose. By the custom of the manor the copyholds which the testator possessed would descend to his customary heir or heirs, the tenure being gavelkind. The testator had not made any surrender of them to the use of the will. When he died in 1799, his only

¹ Conron v. Conron, 7 H. L. Cas. 181.

daughter (the mother of C. W. C. and R. C.) was his customary heir, and on her death, they became her customary heirs.

Held, that the testator's copyhold interest did not pass by the will, but descended to his customary heir :

The annuities created for the maintenance of the grandsons had fallen into arrear :

Held, that they were charged on the real estate itself, and not merely on the annual rents and profits :

Held also that the annuities did not carry interest :

The suit to administer the will was instituted in 1800 ; a great many delays had taken place ; it is a rule of equity to give interest, where there has been unnecessary and vexatious delay ; but as the House could not attribute the delays in this case to any particular party in the suit, no interest was allowed.

As part of the decree of the Court below was sustained, and part was reversed, no costs were given.

A party is not prevented from appealing against a decree because he did not except to the Master's report on which it is founded (p. 565).

WALTER WATKINS, formerly of Llanelly, in the county of Brecon, was, at the date of his will and death, entitled to certain freehold estates, and likewise to an equitable estate in certain copyhold hereditaments, consisting of messuages and fifty-two acres of land, situate in the parish of Bedwelty, in the county of Monmouth, held of the Manor of Abercarne, in that county. The testator had purchased this copyhold estate in 1792, and it was then sur-

* 557 rendered to him in fee, * and he was admitted tenant. He immediately afterwards surrendered it to one Jeremiah Homfray and his heirs, and Homfray was thereon duly admitted tenant. By an indenture, dated 2d May, 1792, and executed between the testator and Homfray, it was declared that the surrender had been made to the intent that Homfray and his heirs might occupy and enjoy the premises and work the mines thereunder for a term of ninety-six years, commencing from Michaelmas, 1791, and they were to make to the testator and his heirs a yearly payment of 50*l.* ; and Homfray covenanted that, at the end of the term, he and his heirs would surrender the said copyholds to the testator and his heirs.

The testator made his will on the 20th of May, 1799, in which he gave the following directions respecting his property : " First, I hereby charge and subject the whole of my real estate, in aid of my personals, to and with the payment ' of debts and funeral expenses,' and subject to and chargeable therewith ; and the encum-

brances which now affect my said real estate or some parts thereof, I give and divide all and singular my messuages or tenements lands, hereditaments, and premises, with the mills, forges, furnaces, foundries, and other buildings and erections, seams and veins of coal, ore, mine, lead, and royalties therein and thereon (over which I have a disposing power), and also all and every such messuages or tenements, lands, hereditaments, and premises, which I may or shall be in anyways entitled to at the time of my decease, in possession, reversion, remainder or expectancy or otherwise, howsoever, situate, lying and being in the counties of Monmouth and Brecon, or otherwise, with all rights, privileges, members, and appurtenances thereunto respectively belonging unto my friends Richard Davies of Courty Gollen, in the county of Brecon, clerk; and Jeffreys Wilkins, of the town of Brecon, esquire, to have and to hold all and singular the said messuages or tenements, buildings, erections, lands, * hereditaments, and premises, * 558 whatsoever and wheresoever, as well in possession as in remainder expectancy with their and every of their respective rights, members, and appurtenances under the said Richard Davies and Jeffreys Wilkins, and the survivor of them, and the heirs and assigns of such survivor from and immediately after my decease, for and during and unto the full end and term of five hundred years, &c., and without impeachment of waste. In trust to the several uses, &c., hereinafter mentioned, that is to say, that they do and shall, out of the rents, issues, and profits of the said messuages, lands, hereditaments, and premises, or a sufficient part thereof, or by assignment, sale, or mortgage of the said term of five hundred years, or any part thereof, levy and raise as much money as, with the amount of my personal estate, which I will and direct to be sold and disposed of as soon after my decease as convenient to my executors hereinafter named, will be sufficient to pay off and discharge, as well the encumbrances now affecting the said premises or some parts thereof, as all other my aforesaid just debts and funeral expenses. And from and after payment thereof, my will and meaning is, and I do hereby request and direct my said trustees, to whom I have devised the said premises, and the survivor, &c., to receive the annual rents, issues, and profits, of the surplus or remainder of my said real estate and premises, and to pay and apply the same, and every part thereof, unto and for the use and benefit of my grandson, Charles Watkins Cracroft,

when and as soon as he shall attain the age of twenty-three years, for and during the term of his natural life. And from and after his decease, I give and devise all and singular my said messuages, lands, hereditaments, and premises, or the surplus thereof, unto the eldest son of my said grandson, Charles Watkins Cracroft, his heirs and assigns for ever, subject nevertheless to, and charged and chargeable with, the payment of the sum of 1000*l.*, which

* 559 I do hereby * empower the said Richard Davies and Jeffreys Wilkins, or the survivor of them, to raise from and out of the aforesaid premises, or any part thereof, by such ways and means as they shall think fit, and to apply and pay the same for the advancement in life, according to the discretion of my said trustees or the survivor of them, of my grandson, Robert Cracroft, at the end of twelve months next after my grandson, Charles Watkins Cracroft, shall have attained the age of twenty-three years. And in case my said grandson, Charles Watkins Cracroft, shall happen to die before he attains the age of twenty-three years without leaving any issue male of his body lawfully to be begotten, then and in that case I do hereby request and direct the said Richard Davies and Jeffreys Wilkins, and the survivor of them, to receive, apply, and pay the annual rents and profits of all the surplus or remainder of my said real estate, and every part thereof, unto and to and for the use and benefit of my said grandson, Robert Cracroft, when and as soon as he shall attain the age of twenty-three years, for and during the term of his natural life." The testator then made other provisions, not now necessary to be noticed, and the will proceeded thus: " And in order that my said grandsons may be duly and properly educated and brought up, I do hereby desire, authorise, and empower the said Richard Davies and Jeffreys Wilkins, and the survivor of them, and the executors, administrators, and assigns of such survivor, to lay out and expend the sum of 200*l.* annually in the maintenance, education, and bringing up of my said grandsons, Charles and Robert, until my said grandson, Charles Watkins Cracroft, shall attain his said age of twenty-three years; and the sum of 100*l.* a year in the like maintenance, education, and bringing up of my said grandson, Robert Cracroft, until he attains the age of twenty-three years, or shall be placed out in business, at the discretion of my said trustees, or the survivor of them."

* 560 * The testator died on the 23d of May, 1799, leaving his

only child, a daughter, Dorothy (married to Charles Cracroft), and the two grandsons, Charles Watkins Cracroft and Robert Cracroft, him surviving. The Rev. R. Davies alone proved the will. On the 7th of February, 1800, he filed a bill against the several persons interested, for a decree for the distribution of the testator's estate. Several deaths took place, and several bills of revivor became necessary, and at length, in the year 1849, Master Kindersley made a report, in pursuance of two decrees of the 27th July, 1827, and the 29th July, 1846. The Master found the facts above stated, and further (among other things) found that the testator, at the date of his will and of his death, was entitled absolutely in equity to the reversion in the said copyhold hereditaments and premises expectant on the said term of ninety-six years, and was subject to a mortgage thereon to one Lawrence Crump, absolutely entitled to the said rent of 50*l.* a year. And that the custom of the manor of Abercarne was, that the estate descended to all the sons (if more than one) in equal shares as tenants in common in fee, and that the descent of an equitable interest in such lands followed the custom which regulated the descent of a legal estate therein. And that Dorothy Cracroft was the customary heir of the testator, and that she died in 1802, leaving her two sons her customary heirs. And he declared his opinion that the said reversion, and the 50*l.* a year as incidental thereto, did not pass by the will of the testator as part of his real estate, or otherwise, but that the same descended to her customary heir. And accounts were fully stated.

The cause came on in July, 1849, upon further direction, before the late Master of the Rolls, when his Lordship declared that Walter Watkins died intestate as to the equitable reversion, and the 50*l.* rent as incidental thereto, and that both descended to and became vested in Dorothy *Cracroft, and on her death *561 became vested in her two sons as her customary heirs, according to the custom of the manor, in equal moieties. And the Master having found that a sum of 17,492*l.* 15*s.* 10*d.* three per cent. annuities, and a sum of 254*l.* 14*s.* 9*d.* were standing to the credit of the cause, it was ordered that so much of the said sums should be sold as would be necessary to raise what was due in respect of the legacy of 1000*l.* given to Robert Cracroft, both for principal and interest, and in respect of the arrears of the annuities of 100*l.* each, and it was referred back to the Master to com-

pute interest at four per cent. on the arrears of these annuities. In February, 1851, the Master made his report in conformity with these further directions, and in July, 1851, a decree was made confirming the same. This was the decree appealed against.

Charles Watkins Cracroft became indebted to the Crown, and also became insolvent, and the Attorney-General and the assignees were therefore made parties to the suit and to the appeal. Charles Watkins Cracroft and his brother Robert were both dead. The appellants claimed under the former, insisting on his title as devisee of the copyholds under the will of Walter Watkins. The respondents claimed under Robert Cracroft, and contended that the copyholds not having been surrendered to the use of the will, did not pass by the will, but descended to the testator's daughter, and then to the two brothers, Charles Watkins Cracroft and Robert Cracroft, as customary heirs according to the custom of the manor.

Mr. J. Walker and *Mr. Cracroft Fooks* for the appellants. — The first question is whether, where a testator is possessed of a legal freehold estate, and also of an equitable interest in a copyhold estate, and makes a general devise, as in this will, of all his * 562 lands and hereditaments, and all * his real estate, such devise will pass the equitable estate in the copyhold. The second question is, whether the annuities are charged upon the real estate, and if so, whether they are charged upon the corpus of the estate, or only on the income, and likewise whether the annuitants are entitled to the arrears of the annuities and to interest thereon, and if to interest, whether that is not to be paid exclusively out of the income produced from the fund which, after payment of the debts, and of the legacy of 1000*l.*, and of the costs, might remain available to answer the same.

As to the first question, the equitable fee in this copyhold estate was in the testator, and the words in his will were sufficient to pass it. General words would always pass copyhold as well as freehold, if the former were surrendered, *Tendril v. Smith*,¹ *Goodwyn v. Goodwyn*.² Such words were always sufficient to pass copyholds, if there was a plain intention of the testator that they should pass, or a necessary implication to that effect, as where he left his estate charged with his debts, and the freeholds were not sufficient to dis-

¹ 2 Atk. 85.

² 1 Ves. Sen. 226.

charge the debts, *Car v. Ellison*,¹ *Drake v. Robinson*.² And since the Statute 55 Geo. 3, c. 192, such words are sufficient to pass unsurrendered copyholds, *Weigall v. Brome*.³ But even before the statute an equitable interest in copyholds would pass without surrender, as was stated by Lord Hardwicke in *Hawkins v. Leigh*:⁴ "It has been said, a will is sufficient to pass an equity in copyhold lands, as well as an equity in freehold lands, though there should be no surrender to the use of a will, and the observation is just." *Greenhill v. Greenhill*,⁵ *King v. King*,⁶ are to the same effect. The Courts never were favourable to this technical rule restricting the operation * of general words in a will and re- * 563 fused to apply it to devises of leaseholds for lives, *Fitzroy v. Howard*,⁷ and *Sheffield v. Lord Mulgrave*,⁸ where the principle was affirmed, but the particular limitations were held inapplicable to such an intent; and in *Thompson v. Lawley*,⁹ the Court even tried to relieve leases for years from its operation, and in all cases where the testator had only copyhold property, it was held to pass by a will containing such a devise without a surrender, and so where he had only leasehold property, *Rose v. Bartlett*,¹⁰ *Day v. Trig*,¹¹ it passed by general words.

The 55 Geo. 3, c. 192, superseded the rule which required a surrender of copyholds to the use of the will; and a copyhold was held to pass under a general devise of real estate, though there was no surrender; *Doe d. Clarke v. Ludlam*,¹² but still it was said that copyholds would not always pass by a general devise without a surrender; for that the statute had merely supplied the form, but not the substance of a surrender.¹³ That, however, only applied to the case of a married woman, not to any person who was in law capable *per se* of making a surrender. So matters rested till the 1 Vict. c. 26, when the Legislature showed that the intention of the parties must in future furnish the governing rule, for it enacted that general words of devise should thenceforth have the effect of

¹ 3 Atk. 73.

² 1 P. Wms. 443. See also *Harris v. Ingledew*, 3 P. Wms. 96.

³ 6 Sim. 99.

⁴ 1 Atk. 388.

⁵ Pre. Cha. 320, 2 Vern. 679, 1 Eq. Ab. 174, pl. 4.

⁶ 3 P. Wms. 358.

¹⁰ Cro. Car. 292.

⁷ 3 Russ. 225.

¹¹ 1 P. Wms. 286.

⁸ 5 T. R. 571.

¹² 7 Bing. 275.

⁹ 2 Bos. & P. 303.

¹³ *Doe d. Nethercote v. Bartle*, 1 Dowl. & R. 81, 5 B. & Ald. 492.

passing both these estates. The fact that the devise here is for five hundred years, without impeachment of waste, does not prevent the lands from passing. Such a clause Lord Hardwicke held to be restrained by the general words of the will, and, at all events, this clause could not affect the interest of the lord of the manor.

This devise in trust of an equitable reversion in fee was * 564 something like a power of appointment: the words * are “over which I have a disposing power”; he was dealing here with the reversion, and subjected it to such trusts as he should appoint. He expressly referred to the “encumbrances which now affect my real estate”; and the rest of his will plainly shows them to affect the copyholds as well as the freeholds.

A case which seems, but really is not, opposed to this argument, is that of *Church v. Mundy*,¹ before Sir W. Grant. That case was chiefly decided upon what the Master of the Rolls deemed the intention of the testator, but, on appeal, Lord Chancellor Eldon took a different view of the testator's intention, and reversed the decree,² assuming, throughout his judgment, that an equitable interest, if the intention was clear, would pass by general words, without a surrender.

Then as to the second question: if any charge is here created, so as to make the arrears of the annuity payable, it is out of the annual income, and not out of the corpus of the estate; *Foster v. Smith*.³ That was a devise of real estates in trust to receive the rents, and thereout to pay to the testator's widow an annuity; and “from and immediately after her death” to convey the estates to his sisters; and it was held by Lord Lyndhurst, reversing the decision of Vice-Chancellor Knight Bruce, that the annuity was only a charge on the rents which accrued during the life of the widow, and not on the corpus of the estate. That case is decisive of the present. *Phillips v. Phillips*⁴ is likewise expressly in point.

Then as to the interest on the arrears: that ought not to be charged. It is an established rule that sums annually payable do not carry interest; *Mellish v. Mellish*;⁵ and unless the * 565 annuitant has been wilfully kept from payment, * the annual sums will not constitute a penalty to be levied on

¹ 12 Ves. 426.

² 15 Ves. 396. See also *Tennent v. Tennent*, 1 Jones & L. 389.

³ 1 Phillips, 629.

⁴ 14 Ves. 516.

⁵ 8 Beav. 193.

the estate ; *Martyn v. Blake* ;¹ *Taylor v. Taylor* ;² *In re Powell's Trust*.³

Mr. Hislop Clarke, on the part of the respondents, at first objected that the appellants had not excepted to the Master's report on which the decree was founded, and that consequently they could not be allowed to complain of the decree which they had allowed to be pronounced on an erroneous report.

[THE LORD CHANCELLOR. — The will was before the Court ; the facts were found in the report ; there was no objection to the finding of those facts ; the Master drew his conclusions of law upon the will, which was itself before the Court ; the appellants were not bound to except to those conclusions. LORD BROUGHAM. — The consequence of this objection, if allowed to prevail, would be this: here is a proposition of law, stated on the face of a decree, and that is brought to the Court of Appeal ; but because there was no exception taken to the report of the Master, with which this proposition of law in the decree agrees, the matter must end by this House maintaining the erroneous (supposing it to be erroneous) proposition of law. THE LORD CHANCELLOR. — Was it ever necessary to except to a report for finding a legal result, when all the facts were before the Court ?]

Mr. Roundell Palmer and *Mr. Hislop Clarke* for the respondents, who claimed under Robert Cracroft. — It is said that intention must prevail. If so, there is no intention shown in this will to pass the copyhold lands, to the exclusion of the proper customary heir. From *Hawkins v. Leigh*⁴ some part of a sentence has been relied on by the other side ; but the decision was unfavourable to the argument of these appellants, and the sentence quoted * ends thus : “ But here there is more than * 566- an equity, because the copyhold lands actually descend upon the son, as the heir to his father.” That is the case here ; and the appellants seek to pass by the will more than an equitable estate, though no surrender had taken place, and though the will was made long before the Statute 55 Geo. 3. *Greenhill v. Greenhill*⁵ is not in point for them ; the surrender was supplied there

¹ 3 Drury & War. 125.

² 10 Hare, 134.

³ 8 Hare, 120.

⁴ 1 Atk. 388.

⁵ Pre. & Ch. 320, 2 Vern. 679, 1 Eq. Ab. 174, pl. 4.

by the plain intention of the testator, and in favour of creditors. In like manner *Car v. Ellison*¹ was decided on plain intention; and so was *Church v. Mundy*.² No intention to pass these copyholds is shown on the face of this will.

The decree is correct in point of principle. The power of devising lands was first given by the Statute 32 Hen. 8, c. 1,³ and doubts having arisen on the construction of that statute, the 34 & 35 Hen. 8, c. 5, was passed, and this latter statute enacted that estate of inheritance should mean only an estate in fee simple. The next statute important to be referred to on this subject is the Statute of Frauds. These statutes came to be considered in the case of *Wagstaff v. Wagstaff*,⁴ where the question was as to the sufficient execution of a will under the Statute of Frauds; and Lord Macclesfield there said that when there had been a surrender of copyholds to the use of a will, they would pass, though the will was not sufficiently executed, because it was not the will, but the surrender which passed them. That is the principle on which the rule of law is founded. Copyholds were not within the first statute of wills, and general words were not (till the late statute) sufficient to pass them, unless there were other words or circumstances in the will, showing an evident, or creating a

* 567 * constructive intention on the part of the testator to include them in the devise: *Scriven on Copyholds*.⁵ An intention to charge copyholds with debts was not implied, if freehold lands were in the same devise, unless the freeholds should be insufficient to discharge the debts: *Chapman v. Hart*,⁶ *Byas v. Byas*; ⁷ and in *Sampson v. Sampson*,⁸ the Court would not, even in favour of a child, supply a surrender under a devise by general words in which copyhold estate was not mentioned. The interest of a *cestui que trust* was devisable without a surrender, but then the intention to devise it must have been evident: *Allen v. Poulton*,⁹ and *Gibson v. Lord Montfort*.¹⁰ Where the intention was clear, there alone such copyholds were allowed to pass, *Greenhill v. Greenhill*,¹¹ *Judd v. Pratt* ¹² (in which Baron Sutton showed

¹ 3 Atk. 73.² 12 Ves. 426, 15 Ves. 396.³ Cruise's Digest, Tit. Devise, ch. 1, §§ 6, 7.⁴ 2 P. Wms. 258.⁵ 4 ed. Vol. 1, p. 236.⁶ 1 Vez. Sen. 485; *Scriv. on Copyholds*, 1 vol. p. 267.⁷ Prec. in Ch. 320, 2 Vern. 679.⁸ 1 Vez. Sen. 271.⁹ 2 Vez. Sen. 164.¹⁰ 2 Ves. & B. 337.¹¹ 1 Vez. Sen. 121.¹² 13 Ves. 174.

that he understood *Car v. Ellison* as now stated), and *Smith v. Baker*,¹ all of which confirm the principle already stated, and illustrate the meaning of Lord Macclesfield in *Wagstaff v. Wagstaff*, where he said, "the copyhold passed by the surrender and not by the will, which was only a declaration of the use of the surrender."

Then assuming that there must be a plain intention, the question of that intention must be decided on the same principles in equity as at law. What those principles are is shown in *Doe d. Clarke v. Ludlam*,² namely, that copyhold passed by the united effect of the will and the surrender, and that "the statute supplied the surrender," without which the copyhold estate could not pass.

* Then as to the fund out of which the arrears of the *568 annuity are to be paid. *Foster v. Smith*³ was decided not on any general rule of law, but on the words of the devise, which directed the trustees on the death of the wife to do a particular act that entirely disabled them from further dealing with the estate so as to satisfy the annuity. In *Picard v. Mitchell*,⁴ the estate was held liable: *Philips v. Philips*⁵ is not an authority the other way, but merely shows that under particular circumstances, though the estate may not be sold, the income may be impounded till the arrears are paid off.

Then as to the interest on the arrears, the Court will act on the circumstances of the case in giving or refusing interest on the arrears of an annuity, *Drapers' Company v. Davis*,⁶ and in *Newman v. Auling*,⁷ Lord Hardwicke decreed payment of interest on an annuity which, like this, had been given for the purpose of maintenance, and that doctrine was acted on in *Noel v. Jones*.⁸ *Crosse v. Bedingfield*,⁹ and *Hyde v. Price*,¹⁰ are cases in which the same rule was applied to annuities given to creditors, and secured by bonds; and in *Martyn v. Blake*¹¹ interest was given because there had been vexation and delay in the payment of the annuity.

¹ 1 Atk. 385.

² 5 Moore & P. 48, 7 Bing. 275.

³ 2 Younge & C. Ch. 193, 1 Phill. 629.

⁴ 14 Beav. 103.

⁵ 8 Beav. 193.

⁶ 2 Atk. 211.

⁷ 3 Atk. 579. See *Lainson v. Lainson*, 18 Beav. 7.

⁸ 16 Sim. 309.

⁹ 12 Sim. 35.

¹⁰ 8 Sim. 578.

¹¹ 3 Drury & War. 125.

Mr. Wickens appeared for the Attorney-General, and cited *Allen v. Poulton*,¹ to show that a trust of a copyhold may be devised without a surrender to the use of a will. He also referred to the debts of C. W. Cracroft, and contended that substantial justice had not been done by the decree.

* 569 * *Mr. Walker*, in reply. — In *Jarman on Devises*, by *Powell*,² the cases on the passing of copyholds by general words in a will are collected, and it is clearly shown that an equitable interest in them will pass by general words without surrender.

THE LORD CHANCELLOR. — My Lords, this lamentably protracted litigation has arisen out of the will of a gentleman, named *Walter Watkins*, who died on the 23d of May, 1799, entitled to both freehold and copyhold estates. He left an only child, *Dorothy*, the wife of *Charles Cracroft*. She died in May, 1802, leaving two sons, *Charles Watkins Cracroft*, and *Robert Cracroft*, both minors, and a daughter, who is not interested in the matters in dispute.

The questions in dispute relate to two subjects: first, an equitable interest in certain copyhold lands and mines to which the testator was entitled at his decease. The appellants contend that this property was included in a general devise of the testator's real estates to *Charles Watkins Cracroft*, the eldest son of his daughter, under which eldest son, they derive title. The respondents, on the other hand, contend that this copyhold property was not disposed of by the will; that it descended to the testator's only child, *Dorothy*, and on her death in 1802, descended on her two sons, *Charles Watkins Cracroft* and *Robert Cracroft*, who were her heirs according to the custom of the manor, and whose interests are now, as I have already stated, represented by the respondents.

The other question relates to annual sums of 100*l.* given by the will for the maintenance of the testator's two grandsons,
* 570 *Charles Watkins Cracroft* and *Robert Cracroft*, until * they should respectively attain the age of twenty-three years.

The appellants contend that these annual sums were not charged on the testator's freehold estates, or if so charged that they affected the annual rents and profits only, and not the corpus, and at all events that no interest ought to have been allowed on

¹ 1 *Vez. Sen.* 121.

² *Vol. 2*, p. 123.

them. The respondents on the other hand contend, in conformity with the decision below, that the corpus of the freehold estates, as well as the rents and profits, was charged with these annuities, and that the Court properly gave them interest on the arrears from the time when each payment became due.

This being the nature of the appeal, I will, in the first place, call your Lordships' attention to the passages in the will which gave rise to the dispute. [His Lordship read the devise.] It is important.

The state of the copyhold property was this: that the testator had an equitable interest in the nature of a reversion expectant on a term of ninety-six years, and an immediate right to an annual payment of 50*l.* during that term, in the nature of rent.

Such being the nature of the testator's interest in these copyholds, the first question is, whether the copyhold estate passed under the general devise, the language of which I have already referred to. It was a devise of "all and singular my messuages or tenements, lands, hereditaments, and premises" upon the trusts to which I have already referred.

This is a question to be decided entirely on authority; the will here was made, and the testator died in 1799, long before the statute of 1815, dispensing with the necessity of a surrender, and therefore the question must be determined according to the then state of the law. At that time, if there had been no surrender to the use of the will, * there could be no devise of * 571 copyholds at all (I put out of the question the equitable doctrine as to supplying surrenders in certain cases), but where there had been a surrender to the use of the will, there in general a devise of "all my lands," or of "all my real estate," or any other equivalent expression, was held to include copyholds. The surrender manifested an intention to enable the surrenderor to devise, or to speak more correctly, to declare the use by his will. Copyholds are aptly described as lands, or as real estates; and a devise of all the testator's lands, or all his real estate, might therefore include his copyholds if it was his intention so to include them. The surrender was evidence of such intention, and *prima facie* therefore they were considered as having been intended to pass. But an equitable interest could not be surrendered. What then was to be the construction of a general devise where the devisor had a mere equitable interest in copyholds? There it is

certain that no surrender could be made, and therefore the indication of intention arising therefrom could not be resorted to. The authorities are not numerous on the subject, but I take the result of them to be that without some indication of intention, *ultra* mere general words of devise, an equitable interest in copyholds would not pass.

This seems to me to be the necessary conclusion to be arrived at from considering the two cases before Lord Hardwicke, of *Car v. Ellison*¹ and *Gibson v. Montfort*.²

In the former case the testator had, on his marriage, become entitled (subject to a life interest in his wife, and an estate tail in the issue of the marriage) to large real estates, the property of the wife, before the marriage. This property included some *572 copyholds, in which the interest *was only equitable.

Lord Hardwicke held, that considering the mode in which the testator had acquired the property, the connection of the copyhold with the particular objects of the devise, the general words must have been intended to embrace the copyholds. Whether the circumstances relied on by Lord Hardwicke were such as ought to have led him to the conclusion at which he arrived, has been doubted. See the remarks of Sutton, Baron, in *Judd v. Pratt*.³ But how far those doubts are well founded is not now the question. What is material is this, that Lord Hardwicke founded his judgment on special grounds, on which he reasoned very elaborately, and not on any general rule which would apply to all cases where a testator has devised by general words not specially mentioning copyholds.

That this was Lord Hardwicke's view of the law is even more clear from what he said in the other case I have referred to, *Gibson v. Montfort*. There the testator expressly devised to trustees all his freehold and copyhold lands, &c., and yet even there Lord Hardwicke said, "all such," i. e. copyholds, "as he was seised of and surrendered to the use of his will, will pass. All such as he had the trust of, the inheritance in himself through the legal estate, in names of other persons will pass; because it has been determined it is not necessary there should be a surrender to use of the will of such trust lands, for not having the legal estate he could not surrender. But that must be in a case where either by

¹ 3 Atk. 73.

² 13 Ves. 174.

³ 1 Ves. Sen. 485.

plain words, or necessary intent, it appears he intended to devise his copyhold lands; and here in express words devising them to trustees."

Against these authorities, resting as they do on a very close analogy to the case of an unsundered legal interest in copyholds, I find no conflicting decision, unless indeed *the *573 older case of *Greenhill v. Greenhill*,¹ which was cited to Lord Hardwicke in *Car v. Ellison*, is to be so considered. But there the question arose as to how far a general desire ought to be considered as including lands compromised in a contract for the purchase of a real estate which had been entered into before the date of the will, but which, by its terms, was not to be completed till a time which was in fact after the will had been executed. Part of the property contracted for consisted of some customary lands which could not be devised without a surrender. One question was, whether this equitable interest, in the customary lands, could be devised without a surrender. But the point seems to have been in the end given up by Sir Joseph Jekyl, who was counsel for the heir, and the only point really pressed was, whether the will could operate on a contract for a future purchase. The question whether, dispensing with a surrender, the customary lands would pass under general words, was not raised; and, perhaps, the circumstance that the freehold and the customary lands were the subject of one and the same contract, might have afforded grounds for holding that the words of devise, which included the freeholds, must of necessity have been meant to include the others also. Be that as it may, I cannot treat that case as sufficient to outweigh the subsequent authority of Lord Hardwicke, unshaken by any later decisions.

An attempt was indeed made by Mr. Walker in his very able argument, to show that the course of decision since the Act of 1815, is calculated to induce the belief that the doctrine in the case of an equitable estate in copyholds, cannot have been such as I have suggested. For since the statute, which makes a surrender in the case of a legal interest in copyholds unnecessary, it has been held in **Doe v. Ludlam*,² that a general devise of *574 real estates will include copyholds as well as freeholds. But there the Court proceeded expressly on the ground that the inference of intention, devised *dehors* the will, from the fact of

¹ Pre. Ch. 320, 2 Vern. 679.

² 7 Bing. 275.

surrender, was by the statute rendered unnecessary, and so that the decision ought now to be the same, in respect to unsurrendered copyholds, as it would before the statute have been if there had been a surrender. It may, perhaps, be a reasonable inference from *Doe v. Ludlam*, that a general devisee of real estate will now carry equitable interests in copyholds, even without any special circumstances indicating an intention to include them. But I cannot deduce from it any argument for determining what ought to have been the construction before the statute. *Equitas sequetur legem* has been the governing principle. Before the statute, general words did not include unsurrendered legal copyholds. So neither did they include equitable interests, unless there was something specially indicating an intention that they should do so. Since the statute, general words do include unsurrendered legal copyholds. Equity will probably follow the same side in the case of trusts of copyholds.

On these grounds, I am of opinion that the appeal on the first point cannot be sustained; but that the Court below was right in holding that, on the decease of the testator in 1799, his equitable copyholds interest descended on his daughter and customary heir-ess Dorothy Cracroft.

I ought to add, that there are circumstances in this will tending to confirm the view which, on general grounds, I take as to the construction. The testator gives to his devisees estates for life without impeachment of waste; and he gives to his trustees extensive leasing powers inconsistent with copyhold tenure.

* 575 These are considerations * which tend to confirm the opinion which, even if there had been no such circumstances, the general current of authority would have led me to form.

The next question is as to the two annual sums of 100*l.* each given by way of maintenance for the testator's two grandsons, whether they are chargeable on the real estate. The words are: "In order that my grandsons may be duly and properly educated and brought up," having first given a term of five hundred years to his trustees, "I do hereby desire, authorise, and empower the said Richard Davis and Jeffreys Wilkins, and the survivor of them, and the executors, administrators, and assigns of such survivor, to lay out and expend the sum of 200*l.* annually in the maintenance, education, and bringing up of my said grandson Charles Watkins Cracroft shall attain his said age of twenty-three

years, and the sum of 100*l.* a year in the like maintenance, education, and bringing up of my said grandson Robert Cracroft until he attains the age of twenty-three years, or shall be placed out in business at the discretion of my said trustees."

I think it clear that the testator meant to make his real estate liable for the payment of these sums. The will is very carelessly drawn. The trustees take a mere chattel interest for five hundred years. And yet in the first trust declared, namely, that for raising money to pay debts, the testator seems to suppose that the trustees and the heirs of the survivor would be the person to raise the money. And so in the latter part of the will, the power of leasing is given to be exercised by his two trustees, or the survivor of them, or the heirs, executors, administrators, or assigns of the survivor.

I deduce very little from this inaccuracy, except that the testator was not precisely aware of the exact nature of the interest which he had given to his trustees. In fact, * they took a *576 term of five hundred years only, and the question is, whether the testator, when he directed his trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, to apply the 200*l.* and 100*l.* annually for the maintenance of his grandsons (i. e. 200*l.* while both grandsons were under the prescribed age of twenty-three years and 100*l.* afterwards), must not be understood as directing them to do so by means of all the funds over which they had control, including therefore the five hundred years' term. I think this is the clear inference from the frame of the will. The testator clearly contemplated a probable deficiency in his personal estate for the payment of his debts; and this being so, it is impossible he could have meant to leave the maintenance of his grandchildren charged exclusively on that fund. It imposes a positive duty on the trustees to provide a maintenance. There is no restriction as to the fund out of which it was to be provided, and as the trustees had a term of five hundred years available for the purpose, I think the testator must have intended that term to be the means of enabling them to perform the duty with which he had charged them.

But then it is said that the annual income only, and not the *corpus*, is charged; for that the testator could not possibly have meant that his trustees should make an annual mortgage to raise whatever the income should be insufficient to produce. No doubt

it is very unlikely that the testator contemplated such a mode of raising the maintenance. He in all probability did not suppose there would be any necessity for resorting to such a measure. But he has certainly directed that the maintenance should be raised; and according to my construction of the will, that it should be raised by means of the five hundred years' term, without any restriction as to the mode of raising it. And this * 577 certainly * makes it a charge on the *corpus* if the annual income is unable to provide it.

The appellants, in support of their argument, relied on the case of *Foster v. Smith*.¹ There a testator devised his estates to trustees, on trust to receive the rents, and thereout to pay to his wife an annuity of 200*l.* for her life, and after her decease, to convey the estates to his three sisters in fee. Lord Lyndhurst held, that after the death of the wife, the sisters were entitled to a conveyance of the property free from any claim on the part of the wife's executors for arrears of her annuity. But the ground on which that decision rested was, that nothing was made liable to the annuity, except the rents which accrued during her life, and so that the estate of the sisters could not be touched. But Lord Lyndhurst, in his judgment, says expressly, that if the trust had simply been to receive the rents and thereout pay to the wife an annuity of 200*l.* for her life, this would have been a charge on the rents until the whole amount of the annuity, with the arrears had been paid. That is the case here. Charles Henry Watkins, the great-grandson of the testator, took nothing till all arrears due for maintenance had been first provided for.

The only remaining question is as to the claim for interest on the arrears of the annuities. The Master of the Rolls has given interest, but he has, in fact, given no opinion on the question as to the right of the annuitants to claim interest, for he proceeded expressly and solely on the ground that he was precluded by what had been already done in the cause from going into a question which he considered, and I think rightly considered, to have been already decided by a previous order of the Court in favour of the claim for interest.

The general rule of the Court is, that arrears of an annuity do not carry interest. In the older cases an exception * 578 * was sometimes made in favour of the annuitant where

¹ 1 Phill. 629.

the annuity was a provision for a wife or a child. Lord Hardwicke acted on this principle in *Newman v. Auling*.¹ But in *Tew v. Earl of Winterton*,² Lord Thurlow repudiated this as a ground of decision; and his view of the law has, as I conceive, ever since been treated as sound and satisfactory.

The cases in which, in later times, the Court, in the absence of express contract, has allowed interest have been confined to those where the annuitant has held some legal security which, but for the interference of the Court, he might have made available for the obtaining of interest; or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay. In this case contract is out of the question; and as the annuitants certainly held no legal security, the only question is, whether the great accumulation of arrears can be attributed to the misconduct of the owners of the property charged. It is distressing to think for what an excessive length of time the rights of the parties interested in this estate have remained unsettled. But on the best consideration of the facts, I am unable to fix the blame of delay on those who were to pay the annuities rather than on those who were to receive them.

[His Lordship here stated the various proceedings in the suit, and their dates.]

The cases having been again set down for hearing, in this last report the Master of the Rolls ordered payment of the 2371*l.* 9*s.* 6*d.* to the personal representatives of Robert Cracroft, and further directed that a sum of 1956*l.* 2*s.* 3*d.* should be carried over to "the defendant Charles Watkins Cracroft's legacy account," there being several claimants on that fund deriving title through or under Charles Watkins Cracroft. The Master of the Rolls, * as I have already intimated, proceeded on the ground that *579 the decretal order of 1849, directing the Master to compute interest on these annuities, was equivalent to a declaration that the annuitants were entitled to interest for that, otherwise the direction to make the calculation was unjustifiable. Both orders, however, that of 1849 as well as that of 1851, are now brought by way of appeal before your Lordships, and unless, therefore, the former order was warranted by the law and practice of the Court, neither of them can stand.

I confess, my Lords, that I can discover no ground here on

¹ 3 Atk. 579.

² 1 Ves. Jun. 451.

which the right to interest can rest. I have already explained that if it can be sustained, it must be founded on the long and inexplicable delay which has attended every proceeding in this unhappy litigation. But mere delay is certainly no sufficient ground for giving interest; and here I seek in vain for any circumstance explaining the delay, or enabling me to attribute it to one party rather than to another, or to say that it was brought about by any thing like misconduct on the part of those chargeable with the payment. I am therefore of opinion that on this part of their case the appellants are right.

What I therefore propose to your Lordships is, to declare that the annuities given to Charles Watkins Cracroft and Robert Cracroft respectively, for their maintenance, did not carry interest, and that the decretal order of the 21st July, 1849, ought not to have referred it back to the Master to compute interest thereon, and consequently that the decretal order of the 10th July, 1851, ought not to have provided for payment of what the Master had found due for such interest. And with that declaration I propose to refer the case back to the Court of Chancery. The rest of the appeal must be dismissed. But I think, as the appellants have in part succeeded, there must be no costs.

* 580 * I ought to say that my noble and learned friend (Lord Brougham), who has left the House, having heard the argument and examined the matter very attentively, authorises me to say that he fully concurs in this judgment.

Declaration made as to certain parts of the decree of the 21st July, 1849, and as to certain parts of the decree or decretal order of the 10th July, 1851, and subject thereto.

Appeal dismissed and cause remitted.

Lords' Journals, 31st July, 1855.

LANE v. HORLOCK.

1856. February 11, 12, 14; March 4, 10.

RICHARD KIRKMAN LANE, *Appellant*.J. J. HORLOCK, S. REW, and Q. REW, *Respondents*.¹*Usury. Security on Lands.*

Where money is advanced at usurious interest on the security of bills of exchange, having only three months to run, such advance is protected, and the bill themselves are valid under the 3 & 4 Wm. 4, c. 98, § 7, and though a warrant of attorney to confess judgment may be taken at the same moment, on which judgment is the next day entered up and registered under 1 & 2 Vict. c. 110, so as to become a charge on the lands of the debtor, the transaction is not thereby rendered invalid under the proviso of the 1st section of the 2 & 3 Vict. c. 37.

The 2 & 3 Vict. c. 37, does not repeal the 3 & 4 Wm. 4, c. 98.

Semble that a warrant of attorney to confess judgment, though by such judgment the lands of the debtor may be charged, is not a charge upon land.

H. had received from L. money advanced on the security of bills of exchange. In October, 1843, he wanted a further advance, which L., after inquiring into the value of his real estate, consented to make, on condition that three months' bills should be given for the amount (usurious interest included) and that a warrant of attorney to confess judgment, which L. should be at liberty to enter up immediately, should also be executed. All this was done, and judgment was entered up on the following day, and the judgment registered. The bills given in October, 1843, were not paid when they became due in January, 1844, and others were then substituted * for them. These * 581 last were also dishonoured. A sale of H.'s estate took place, under a mortgage, executed to a prior creditor, who received more than would satisfy his claim:

Held, that L. was entitled to maintain a bill against him to pay over so much of the surplus in his hands as would satisfy L.'s judgment.

This House does not reform a decree of the Court below.

THIS was an appeal against a decree of Vice-Chancellor Kindersley, dismissing with costs a bill filed by the appellant.

In the year 1843 Horlock, then the owner of an estate called the Rocks, in the parish of Marshfield, in the county of Gloucester (but which estate was heavily mortgaged), was introduced by

¹ Shaw v. Neale, 6 H. L. Cas. 610; Croft v. Lumley, 6 H. L. Cas. 685; Jeffries v. Alexander, 8 H. L. Cas. 606.

Foster, his then solicitor, to Lane, for the purpose of having two bills of exchange discounted, both payable at three months after date, one for the sum of 298*l.* 10*s.*, the other for 225*l.* 6*s.* 6*d.* The first of these bills was dishonoured when it became due; the interest on it was regularly paid up. Before the second of them was at maturity, namely, in October, 1843, Horlock required a further advance, and, through his solicitor, applied to Lane to let him have a sum of 800*l.* Lane told Foster that if he made any further advance he must know the extent and rental of Horlock's estate, and the encumbrances upon it, and must be informed in writing what judgments there were against it, and also the exact amount he was required to lend, and further, that he must have not only bills of exchange for the amount then to be lent, but also a warrant of attorney, to secure the amount of both the bills which he then held, and of any bills which he might afterwards discount, not to exceed in the whole a definite sum; and must be at liberty immediately to enter up and register a judgment on this warrant of attorney. The information was furnished on 25th October, 1843, and there appeared to be

* 582 * certain mortgages on the estate, but no unsatisfied judgments.

On the same day Horlock went to Lane, who produced a cash account, debiting Horlock with the sum of 1528*l.* 7*s.* 6*d.*, made up of the 800*l.* then to be advanced, and three months' interest thereon, at the rate of sixty per cent. per annum; also the two bills then in Lane's hands, and interest at the same rate, and the expense of the warrant of attorney and the stamps; but Horlock was allowed 4*l.* as a rebate of interest on the bill for 255*l.* 6*s.* 6*d.*, which would not be due till the following 11th November. This account Horlock signed, and Lane then advanced 800*l.*, and Horlock accepted three bills for the whole amount thus agreed to be due. At the same time Horlock executed a warrant of attorney to confess judgment against him in the Court of Queen's Bench in a sum of 4000*l.*, with a defeasance declaring that it was to secure payment of "every sum not exceeding 2000*l.*, which may at any time hereafter be due to Lane upon any bills or notes which shall be made, drawn, or accepted by Horlock, and be discounted for him, or for his use, by Lane."

On the 27th October, Lane entered up judgment on the warrant of attorney, and registered it, so as to make it under the 1 & 2

Vict. c. 110, § 13, a charge on real estate. The three bills became due on the 28th January, 1844, but on the 26th January three fresh bills were drawn to replace them; these new bills being given for the whole amount then due, namely, 1754*l.* 14*s.* 6*d.*, the interest being carried on at the same rate as before. The three renewed bills became due on the 29th April, but were not paid. On the 1st June, 1844, Horlock accepted a bill for 175*l.* 12*s.* 6*d.*, and on the 4th July, 1844, he accepted another for 351*l.* 6*s.* 6*d.*, each being for the interest *alone. The aggregate *583 of the five bills amounted to 2281*l.* 13*s.* 6*d.* None of these bills was paid. A person named Quincey (now represented by the Rews) was entitled to a mortgage on the Rocks estate for 2000*l.* There were several other and prior mortgages, but Quincey's claim preceded that of Lane. In 1846 a rule was obtained by Horlock in the Court of Queen's Bench, calling on Lane to show cause why the warrant of attorney and all the subsequent proceedings should not be set aside, on the ground that the transaction was one of usury, and the security was one upon lands, within the 2 & 3 Vict. c. 37, § 1. The case was argued before Mr. Justice Wightman, who, adopting a previous decision of the Court of Queen's Bench, in *Withey v. Gilliard*,¹ discharged the rule.² On the 14th October, 1847, the appellant issued the usual writ of *elegit* on the judgment, and on the 5th October, 1848, registered the judgment, pursuant to the 2 Vict. c. 11, § 4. In the summer of that year an attempt had been made to sell the Rock estate on the demand of Quincey, but no sale was effected. In November, 1848, it was sold to Mr. Serjeant Wrangham for a sum of 38,963*l.* The encumbrances prior to Quincey's mortgages amounted in the aggregate to 33,377*l.* 18*s.* 11*d.* The balance was paid to Quincey, who, after satisfying his own mortgage, held in his own hands a balance of 3495*l.* 1*s.* 2*d.* Lane claimed this balance in discharge of his own demand, but as payment to him was resisted, he, in September, 1849, filed his bill in the Court of Chancery, stating the matters above set forth, and praying that he might be declared entitled to a lien in respect of his judgment upon the balance of the purchase money, &c. The answer to the claim was, that the transaction was invalid, as being one in which an advance *of money had been made on the secu- *584 rity of land, and therefore contrary to the proviso in 2 & 3

¹ 23 Legal Observer, 237.² 4 Dowl. & L. 408.

Vict. c. 37, § 1.¹ Evidence was gone into on both sides, and the cause came on for hearing before Vice-Chancellor Kindersley, who on the 9th July, 1853, made a decree dismissing the plaintiff's bill with costs.²

Mr. Loftus Wigram and *Mr. Wordsworth* (*Mr. Flather* was with them) for the appellants. — It may be admitted that as soon as the judgment signed on this warrant of attorney was registered, there was a charge upon the lands. But the giving of the warrant of attorney was not creating a charge upon lands, so as to render these securities void. The original transaction was merely one of discount of bills, and in such a transaction it does not matter whether a payment is made in cash or in new bills. Being so, the fact that something which might become a charge on lands was given at the same time, would not invalidate it. That was the opinion of Mr. Justice Wightman when this case was before *585 a Court of common law.³ This is not like the case of *Flight v. Salter*,⁴ when the warrant of attorney was expressly stated to be given to secure an annuity, which was specifically charged on the rectory, glebe, and tithes.

[LORD BROUGHAM. — You might have an elegit on a judgment entered up on this warrant of attorney.]

Certainly; and if the principle contended for on the other side is correct, and is carried to its extreme length, it follows that no bill of exchange can be a good security for a debt, because, through the medium of a judgment obtained in an action on the bill, it

¹ The 2 & 3 Vict. c. 37, § 1, declares that bills of exchange, not having 12 months to run, and contracts for the loan or forbearance of money above 10*l.*, are not to be affected by the usury laws, "provided always that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein."

The 3 & 4 Wm. 4, c. 98, § 7 (the Bank Charter Act of 1833), had previously declared, "That no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon, or secured thereby, on any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same be void," nor the liability of the parties thereto be affected, nor any party be subject to penalties under any law relating to usury.

The 1 & 2 Vict. c. 110, §§ 13 and 19, gives to a judgment which has been registered the effect of a charge on the real estate.

² 1 Drewry, 587, where the bill is fully set forth.

³ 4 Dowl. & L. 408.

⁴ 1 B. & Ad. 673.

may ultimately become a burden upon land; but no such argument can be maintained. Mr. Justice Patteson, who in *Withey v. Gilliard*, delivered the judgment of the full Court, anticipated that difficulty, and declared that to bring the case within the statute the loan must itself be made upon the security of the land. *Clack v. Sainsbury*,¹ and *Nixon v. Phillips*, and *Connop v. Meaks*,² and *Doe d. Haughton v. King*,³ show that this case is within the protection of the 3 & 4 Wm. 4, c. 98, which renders such transactions legal, and is not affected by the proviso in the Statute of 2 & 3 Vict. c. 37, respecting land. Warrants of attorney are not necessarily void, though they may ultimately be made charges on benefices, Jarman's Conveyancing,⁴ unless such intention is shown on the face of them, *Flight v. Salter*.⁵ In *Hawkins v. Gathercole*,⁶ the creditor under such a judgment was held entitled to have a receiver appointed.

The 3 & 4 Wm. 5, c. 98, and 2 & 3 Vict. c. 37, must be read together as if they were one Act, and then the proviso * in the latter statute will be seen to be a mere exception to * 586 the enactments of the former. If the case is within either of these Acts it is wholly clear of the statute of Apne.

In *Berrington v. Collis*,⁷ a loan of money at more than five per cent. upon the security of the deposit of a lease, a warrant of attorney, and a promissory note, was held not to be protected under the 3 & 4 Wm. 4, c. 98, but that was because the Court thought that the circumstances of the case showed the deposit of the lease to be the real security, and that the promissory note was only given to put a colour upon the transaction. But where the original transaction is valid, a subsequent matter, in itself invalid, will not make the whole so. *Parker v. Ramsbottom*,⁸ *Bell v. Coleman*,⁹ *Ex parte Warrington*,¹⁰ *Washbourn v. Burrows*,¹¹ was cited in that case, but did not affect the decision; for in fact *Washbourn v. Burrows* is a decision on pleading alone, and does not determine the effect of the statute, but only the form in which it was there presented to the Court.

¹ 11 C. B. 695.

² 11 M. & W. 333.

³ 2 A. & E. 326.

⁴ Ed. by Bythewood, Tit. Mortgage, Vol. 5, p. 217.

⁵ 1 B. & Ad. 673.

⁶ 2 C. B. 284.

⁷ 1 Sim. N. S. 63.

⁸ 3 De G., M. & G. 159.

⁹ 5 Bing. N. C. 332, 7 Scott, 302.

¹⁰ 1 Exch. 107.

¹¹ 3 B. & C. 257.

But even if this judgment should be held bad as to some of the bills, it must be held good as to the rest. *Follett v. Moore*,¹ *Thibault v. Gibson*,² *Semple v. Cornwall*,³ and *Boyle v. Bull*.⁴ The cases of *Hodgkinson v. Wyatt*,⁵ *Fussell v. Daniel*,⁶ and *James v. Rice*,⁷ do not apply to the present. In the first, the action was brought on a bond, which is distinguishable from a bill, not being introduced into the protecting enactments of the recent * 587 statute. Secondly, a part of the security was * expressly upon land; and lastly, the decision of Vice-Chancellor Wood, in *James v. Rice*, was allowed by the Lords Justices,⁸ who held that an original transaction which was usurious had been made legal by a subsequent parol agreement for a mortgage at legal interest.

Mr. W. M. James and *Mr. Hetherington* for the respondent Horlock. — The bills were introduced as a mere colour to the transaction. The land was the real security. The evidence here shows that Lane refused to make any further advance, except until after he had satisfied himself as to the land being a good security for the advance. That fact makes *Berrington v. Collis*⁹ not merely applicable to this case, but decisive of it. *Doe d. Haughton v. King*,¹⁰ on the other hand, was a case where it was found as a fact that the money was advanced on the security of the note, and not of the land, and the decision was founded on that fact. Of course the fact must decide such a question. Here it is plain that the land was the real security, and the bills were only resorted to as a pretence. The intention of the Legislature was that no interest on loans exceeding five per cent. should be secured on land. It would be absurd to suppose that so shallow a contrivance as that resorted to here could be allowed to defeat that intention.

Mr. Cairns and *Mr. Bridge* for the respondents Rew. — When the judgment was entered up, the case was the same as if a mortgage had been executed to secure the debt. Such a mortgage

¹ 4 Exch. 410.

² 12 M. & W. 88.

³ 10 Exch. 617.

⁴ 3 Com. Law Rep. 1054.

⁵ 4 Q. B. 749.

⁶ 10 Exch. 581.

⁷ Kay, 231.

⁸ 5 De G., M. & G. 461.

⁹ 5 Bing. N. C. 332, 7 Scott, 302.

¹⁰ 11 M. & W. 333.

would have been void; the judgment in like manner is invalid. If a mortgage, it is the * same for the purposes * 588 of this statute, whether it is equitable or legal. *Rolleston v. Morton*¹ shows that even before the issuing of an elegit, a judgment creditor has, under such circumstances as exist here, an equitable charge on the estate, and is a necessary party to a foreclosure suit. In that case the debtor had "agreed to charge" the land; in this he gave the creditor the power instantly to fix a legal charge upon it. The consequences of this mode of proceeding are thus stated by Lord St. Leonards in that case: —²

"But when you come to the Act it is impossible to argue the question. That which was by the statute of Westminster a general lien, by this Act becomes a specific charge. No words could be more express for this purpose, 'had agreed to charge.' Now any person who has power to charge, and has agreed to charge, in equity has charged; therefore, under the Act of Parliament, there is no question but that the judgment, whether on the legal or equitable estate, becomes an equitable estate, and then it assumes quite a different character, and becomes a specific encumbrance." Any one who has given a warrant of attorney to enter up judgment, which may at once be made a legal statutory charge on the land, has done at least as much as a person who has "agreed to charge." The decision in that case is, therefore, directly applicable.

[LORD BROUGHAM. — Is it your contention that any taking of a warrant to confess a judgment converts the transaction into taking a security upon the land, and brings it within the Act?]

The respondent need not go quite the length of that argument. It is enough that the warrant of attorney enabled the appellant so to act as to obtain at once a security on the land, though the appellant was not willing * to take a regular mortgage, * 589 because his usurious rate of interest would have made that invalid; he really would not have advanced the money but for the security on the land. He would not advance one shilling till he was satisfied as to the rental of the land, and as to the burdens upon it. Being so satisfied, he advanced the money, taking at the same time bills of exchange, which were, in truth, but collateral securities.

The 3 & 4 Wm. 4, c. 98, does not validate the whole transac-

¹ 1 Connor & L. 252.

² 1 Connor & L. 266.

tion, merely because, mixed up with other things, there are bills of exchange of a date not exceeding three months; nor will the 7th section of that Act have that effect, even if read, as it was read in *Thibault v. Gibson*,¹ as if incorporated in the statute of Anne; for otherwise a mortgage to secure a loan advanced on usurious interest would be good, provided only that it was accompanied with bills of exchange for the amount not exceeding three months' date. The Statute 3 & 4 Wm. 4, was included for the benefit of commercial transactions, and for them alone. But as to every thing beyond bills it left the Statute of Anne in full force.

[LORD BROUGHAM. — Has it ever been held that a bill at three months is within the 7th section, though there is a stipulation to have it renewed every three months up to a certain period?]

No such decision is known to have been pronounced. The case of *Berrington v. Collis*² must govern the present. The Court there decided, as the Court did here, that the giving of the bills was collusive, and that the real security was the warrant of attorney. *Lane v. Horlock*, as decided in the Bail Court,³ does not affect the point raised here. That decision did not go on the 3 & 4 Wm. 4, but on the 2 & 3 Vict.

*590 * [THE LORD CHANCELLOR. — Suppose the original transaction had been valid and *bonâ fide*, and in October new bills had been given, and that between October and January a warrant of attorney had been thought of and given, so as to be clearly a collateral security, then that the new bills due in January had been unpaid, would not they be valid as standing in the place of the old ones, and would not the charge created by the warrant of attorney be good?]

That question may be answered by an illustration. Suppose the case of a banker's balance, a legal debt is incurred, and a mortgage is taken for it. No illegal interest has then been charged; but when the time comes to pay off the mortgage, the debtor is not able to pay, and then an agreement is made to forbear. Suppose illegal interest then charged; though that would not be a new loan, it would be a new transaction, and the illegal interest then agreed on would render the whole transaction illegal. Here the old bills are charged with usurious interest, and that interest forms part of the principal of the new bills, which would not have been renewed

¹ 12 M. & W. 88.

² 4 Dowl. & L. 408.

³ 5 Bing. N. C. 332, 7 Scott, 302.

but for the warrant of attorney and the judgment, and the whole affair is really arranged with reference to the security on the net estates.

[THE LORD CHANCELLOR. — Suppose there had been an original mortgage for five per cent. bills, which was good, but afterwards, when they became due, new bills with usurious interest were given, would the mortgage continue good ?]

It would not. That is the result of the cases in the Queen's Bench and Exchequer, decided on the 3 & 4 Wm. 4. *Clack v. Sainsbury*¹ does not affect this case: the decision there turned entirely on the form of the pleadings, so did *Nixon v. Phillips*,² and both were actions in assumpsit. *Washbourn v. Burrows*,³ *Semple v. Cornewall*,⁴ were also cases depending on the particular forms * of the pleadings. *Follett v. Moore*⁵ was trover for *591 the conversion of a lease, and the question there was, whether a certain document was a promissory note.

That shows that the bills may be good, and yet that the security on the land may be bad, and so sustains the judgment of the Vice-Chancellor.

This case was properly rested, in the Court below, on the 2 & 3 Vict. c. 37, and the transaction was held invalid as to the land, without impeaching the bills. The decision of this case in the Court of Queen's Bench⁶ does not raise the question on the same facts as are now presented to the House, and for the same reason, *Withey v. Galliard* is not an authority applicable here. It is impossible to deny that the money here was advanced on the security to land, and if so, it is directly within the proviso of the Statute of Victoria.

The fact that the warrant of attorney here might be defeated by the effect of a previous registration of another judgment, does not show that it was not a security upon the land. The cases relating to ecclesiastical benefices do not apply, for they depend entirely on the peculiar words of the Statute of Eliz., *Colebrook v. Layton*,⁷ *Hawkins v. Gathercole*,⁸ and *Flight v. Salter*.⁹

The form of the defeasance here leaves no doubt that the war-

¹ 11 C. B. 695.

² 7 Exch. 188.

³ 1 Exch. 107.

⁴ 10 Exch. 617.

⁵ 4 Exch. 410.

⁶ 4 Dowl. & L. 108.

⁷ 4 B. & Ad. 587.

⁸ 1 Sim. N. S. 63.

⁹ 1 B. & Ad. 673.

rant of attorney was intended as a security on the land, and that the money was advanced on that security, and not upon the bills. The bills which were given were not such as were described in the defeasance. In that the warrant of attorney is described to be given to secure “ money due to Lane by virtue of any bill of exchange, or promissory note, which shall be made, drawn, * 592 or accepted * by Horlock, and discounted for him by Lane.”

Now, no one of these bills comes in within that description. This is not a security for the bills or promissory notes of third parties, discounted by Lane for Horlock, for no such bills came into existence, nor for bills which Horlock might have made. They were drawn by Lane and accepted by Horlock, but were never discounted at all. Yet the bill alleges that to be the fact, and that allegation must be strictly proved. It may be that this objection would not lie in the mouth of Horlock himself, but the creditors of Horlock, whom the respondents, the Rews, represent, are entitled to take advantage of it. There is nothing here to fulfil the condition of the defeasance, and on that ground the case of the plaintiff below fails.

Mr. Wigram, in reply. — The real question here is, whether, under the circumstances of the case, the warrant of attorney can be considered as a security upon land. If it cannot, it is protected by the statute, for all contracts and securities, except upon land, are now taken out of the operation of the Statute of Anne. The whole transaction was complete on the 25th of October; the judgment on the warrant of attorney was not entered up till the 26th of October, and in this case itself it has been held at common law, that the security on land must be one taken at the time, in order to bring it within the operation of the statute.

The last part of the argument, on the other side, cannot be sustained; it would too much narrow the construction of the statute. The defeasance must be read as if the words were, “ and every bill discounted for his use.” It is enough that any bills held by Horlock, whether drawn or accepted by him or not, were discounted by Lane for Horlock’s use.

* 593 * *THE LORD CHANCELLOR.* — My Lords, the question in this case is as to the validity of a security by means of a warrant of attorney and a judgment thereon. The objection is, that the

judgment was given to secure a debt, made up in great part of usurious interest, and so void, as being a charge on land. The facts of the case are these — [His Lordship stated them very fully.]

The present bill was filed by Lane against Horlock and Quincey's executors (Quincey himself having died), and the object of the bill is to charge Quincey's executors with the amount of the money secured by the warrant of attorney, which is much less than the surplus which came to the hands of Quincey.

There would be no doubt as to Lane's title to the relief he asks, if the rate of interest payable on his advance to Horlock had not exceeded five per cent. But his demand is resisted by the defendants, on the ground that the interest was made payable at the rate of sixty per cent. per annum, and consequently that the transaction was usurious and void.

That it would have been void under the statute of Anne is not disputed; but the plaintiff contended that he was protected by the operation of two statutes; that is to say, first, by the 3 & 4 of Wm. 4, c. 98, §§ 7 & 8; secondly, the 2 & 3 Vict. c. 37, § 1. The seventh section of the statute of William is — [His Lordship read it, and also the 11th section of the 2 & 3 Vict. c. 37.]

The argument in the Court below, though there were two statutes referred to, seems to have been confined to the effect of the latter statute only; for though the Vice-Chancellor mentions the Statute of 3 & 4 Wm. 4, c. 98, yet he says: "The whole contention has been that the effect of the Statute of the 2 & 3 Vict. c. 37, is such as to entitle the plaintiff to the relief he prays." And then a few lines *lower down: "Then *594 came, in 1839, the Statute of the 2 & 3 Vict. c. 37, on the construction of which the present case turns." And on referring to the report of the case the argument at the bar seems to have been confined entirely to the effect of that latter statute, and not to have rested on the prior Statute of the 3 & 4 Wm. 4.

On the question, so far as it turns on the effect of the statute of Victoria, we have two conflicting decisions; for in 1846, before any sale of the lands had been made, Horlock applied to the Court of Queen's Bench to set aside the judgment entered up on the warrant of attorney, on the ground that it was void for usury.¹ It was contended, that by the operation of 1 & 2 Vict. c. 110,

¹ 4 Dowl. & L. 422.

§ 13, a judgment is made expressly a charge on the lands of the debtor, and therefore that a loan of money on the security of a warrant of attorney, upon which judgment may be immediately entered up, is in substance a loan on security of lands, or of an interest therein, and so is not protected by the statute of Victoria. Mr. Justice Wightman, however, held that this was not so; that a loan on a discount of bills, payment of which is secured by a warrant of attorney, authorising the immediate entering up of judgment, is not a loan upon the security of lands within the meaning of the proviso in the statute of Victoria. And in support of that view of the case his Lordship relied on a previous case of *Withey v. Gilliard*,¹ in the Court of Queen's Bench, in 1842, cited in a note to the case of *Lane v. Horlock*.¹ There a similar application was made to the Court of Queen's Bench to set aside a judgment entered upon a warrant of attorney, given on an advance of 500*l.*, for which the lender also took a bill at two months for 600*l.* The Court refused the application; Mr. Justice Patteson, who delivered the judgment of the Court, saying: "The security does not

* 595 say that the money was borrowed on the security * of any lands. To bring the case within the Acts referred to, the loan itself ought to be made on the security of the lands. It is not sufficient for that purpose that by the operation of law the defendant's lands may ultimately be charged with the debt. The intention of the Legislature was confined to the case of a security originally given, charging the lands. The Act was not meant to apply to cases where the lands only indirectly come to be affected in this way." Mr. Justice Wightman, acting on that authority, the correctness of which he did not appear to doubt, decided against the application of *Horlock* to set aside the judgment.

When this same case of *Lane v. Horlock* came before Vice-Chancellor Kindersley, not, of course, as it had come before the Queen's Bench to set aside the judgment, but on the present bill, seeking to make the judgment available against the proceeds of the real estate, his Honour questioned the correctness of the decision, or at all events of some of the propositions stated by Mr. Justice Wightman. His Honour considered that, inasmuch as by the express terms of the 1 & 2 Vict. c. 110, § 13, it is enacted that a judgment creditor is to have the same remedies as if his

¹ 23 Legal Observer, 237.

debtor had agreed in writing to charge his lands, it was difficult to say that in a case where real estate was intended to be charged, the proviso in the statute could be avoided by obtaining the charge, not directly by a writing signed by the debtor, but by a judgment to which the statute gives the effect of such a writing.

It is impossible not to feel the force of this reasoning. Perhaps the difficulty may be solved by considering that the question, whether a judgment is a security on lands within the true intent and meaning of the proviso in the Statute of the 2 & 3 Vict. c. 37, cannot be answered in the abstract. If the debtor has no lands nor any expectation * of having lands, and the judgment is *bonâ fide* given only to enable the creditor in case of default in payment to take goods or the body of his debtor in execution, and to save the delay and expense of an action; this can hardly be described as obtaining a security on land. On the other hand, if, as in the present case, the debtor has lands, and the loan is made in circumstances which lead the Court to the conclusion, as matter of fact, that, but for the land, the money would, in all probability, not have been advanced, I am rather inclined to concur with the Vice-Chancellor in thinking that a judgment so given is a security on land within the true intent and meaning of the proviso. His Honour, however, thought he was not bound to decide this point, for that his judgment refusing the plaintiff any relief against the proceeds of the real estate might stand with the previous decision of Mr. Justice Wightman, when he refused to set aside the judgment. The statute might, he thought, be read as not avoiding the debt, except so far as it amounted to a charge on the land; leaving the rights of the creditor untouched in other respects. And for this his Honour relied mainly on a recent decision of the Lords Justices, made on an appeal from the Commissioners of Bankruptcy, *Ex parte Warrington*, in the matter of Leake.¹ There it was held in a very elaborate judgment of Sir George Turner that the holder of promissory notes on which interest was payable at more than five per cent. might prove them under the bankruptcy, though payment was secured by a mortgage on the bankrupt's lands stipulated for and given when the notes were made and signed.

This distinction may perhaps reconcile the two apparently conflicting judgments in this case. But I do not think it necessary

¹ 3 De G., M. & G. 159.

to come to any decided opinion on this point; for in the
 *597 view which I take of the subject, the * question does not
 turn on the statute of Victoria, but on the previous Statute
 of the 3 & 4 Wm. 4, c. 98, § 7. That statute enacts that no bill
 or note payable at or within three months after the date thereof
 shall be void by reason of any interest reserved thereon, any law
 or statute relating to usury notwithstanding. There is not, in
 respect of bills or notes coming within the purview of this statute,
 any exception whatever as to real security. The enactment is
 general, and extends to the case of all bills and notes not having
 more than three months to run. Now, in this case, the bills in
 question are all bills at three months, and so are within the very
 terms of the Statute 3 & 4 Wm. 4.

It was at one time thought that this statute was repealed by the
 subsequent Statute of 2 & 3 Vict. c. 37, but the contrary has been
 expressly decided in the case of *Clack v. Sainsbury*,¹ and after-
 wards in the case of *Nixon v. Phillips*.²

It has further been decided that, as by the express enactment of
 the Statute of Wm. 4, bills are made good notwithstanding the
 reservation of interest beyond five per cent., so all securities for
 the due payment of the bills are also made good. This was de-
 cided in *Doe d. Haughton v. King*,³ and the principle was again
 recognized very recently in *Semple v. Cornewall*.⁴

I have the less hesitation in asking your Lordships to adopt this
 view of the case, because, though the result will be, that the judg-
 ment below must be reversed, yet, in truth, we shall not be ex-
 pressing any opinion at variance with that of the Vice-Chancellor
 on the point which alone was argued before him. Had the
 *598 question turned upon the * point on which he decided the
 case, I should, as at present advised, have concurred with
 him; but the question turns, in my opinion, not on the statute of
 Victoria, but on the previous Statute of Wm. 4, the effect of
 which was not brought under his observation.

I should observe that in the argument here it was contended
 that the Statute of Wm. 4 does not protect these bills, because
 they were merely a collateral security, the loan really having
 been made on the security of the judgment. And in support of
 this argument reliance was had on the case of *Berrington v.*

¹ 11 C. B. 695.

² 11 M. & W. 333.

³ 7 Exch. 188.

⁴ 10 Exch. 617.

Collis.¹ But that case was decided expressly on the particular facts found. The Judges, by agreement of the parties, were put in the place of a jury, and they found that the loan then in question was made on the security of a leasehold dwelling-house, and that the promissory note was added for the purpose of legalizing the interest beyond the rate of five per cent., in other words that the transaction *quoad* the note was merely colourable. Now, in this case, exercising the same function of a jurymen, I arrive at a different conclusion of fact. I am satisfied that these bills were not given as a mere colour to make the loan legal. The first loan had been made on the security of bills, and nothing else. The second loan, consisting of the renewed bills and the further advance, was made in the same way on the security of new bills, though certainly the money would not have been advanced if there had not been the further security of the warrant of attorney by means of which the plaintiff saw he could get what was, in effect, a security on the real estates, subject to the prior charges, and the further renewals given in January, 1844, when the bills of October became due, stand on precisely the same footing as those for which they were a substitute.

* I am therefore satisfied that these bills were not by any * 599 means given merely colourably. They were given *bond fide*, and so they are bills protected by the 3 & 4 Wm. 4, c. 98, § 7; and therefore the judgment, even treating it as an equitable charge on the debtor's land, is still a valid and available security.

It remains only that I should notice an argument pressed on your Lordships by Mr. Cairns in his very able address. He contended that these bills are not protected at all by the warrant of attorney, for by the terms of the defeasance the judgment to be entered up was to stand as a security only for bills accepted by Horlock and discounted by Lane. The bills now in question were certainly accepted by Horlock, but Mr. Cairns contended that they were not discounted by Lane. I cannot, however, accede to this reasoning. The bills accepted in October were in the strictest sense discounted by Lane, and it is impossible to say that the renewed bills were not discounted in like manner; they were accepted for the amount of the former bills, with fresh interest, and Horlock obtained value for them by means of the former bills, for which they were substituted. The difference between the amount

¹ 5 Bing. N. C. 332.

of the new and the old bills being the profit in the nature of interest made by Lane, this was substantially a discounting by Lane of the new bills.

On the grounds, therefore, which I have indicated, I am of opinion that Lane was entitled to the relief he sought by his bill ; and I propose, therefore, to ask your Lordships to declare that he is entitled to the extent of 2000*l.*, the amount secured by the judgment, to a lien on the proceeds of the real estates of Horlock, which came to the hands of Quincey, after satisfying all charges prior to the judgment. And with that declaration the case must be remitted to the Court of Chancery.

* 600 * LORD BROUGHAM. — My Lords, I also consider it to be a very satisfactory matter that we, in disposing of this case, as we ought to do undoubtedly, by the reversal propounded by my noble and learned friend, are not taking upon us the somewhat thankless office, always to be avoided where possible, of deciding between two opposite views, two conflicting judgments, which appear to have been come to on the opposite sides of Westminster Hall ; by the Vice-Chancellor on the one hand, and the learned Judge of the Queen's Bench on the other. It is not necessary, however, to give an opinion as to which was right in that matter ; because our judgment here proceeds upon a view of the case which leaves that matter entirely on one side. Nevertheless I shall, before concluding the very few observations which I shall submit to your Lordships, advert to that difference between those learned Judges, which I should be very loth to do, if it were not that this is happily the last case which can ever come before us upon that ancient and standing grievance to the Courts of Westminster Hall, both of law and of equity, the usury laws ; those usury laws having most happily now ceased to exist. [See 17 & 18 Vict. c. 90.] But for that settlement of all disputes of this description, I should certainly have felt disposed to give an opinion which would seem to militate against one of the judgments in the case under your Lordships' consideration.

It seems to me quite clear that this case turns upon the Bank Continuation Act of the year 1833, the 3 & 4 Wm. 4, c. 98, § 7 ; the Act itself was to continue the bank, but there were sections introduced to protect certain bills of exchange and promissory notes, and then section 7 of that Act was renewed and

applied to other bills by the 2 & 3 of the present Queen, c. 37, which had nothing to do with the bank, but was confined to the provision which had * been introduced by the seventh * 601 section of the Act of 1833 ; and I well remember that this proviso was added with respect to real securities for the purpose of quieting alarms that were felt in certain quarters with respect to the tendency of the partial repeal of the usury laws. The tendency of that partial repeal, it was alleged, would be to increase the rate of interest upon mortgage ; and it was mortgage more than any thing else that was in contemplation of the Legislature when the proviso was introduced into the Act of the 2 & 3 Victoria.

With respect to the Act upon which this question turns, viz., not the latter Act, but the former Act, the seventh section of the Bank Continuation Act of 1833, that Act appears to have been considered in the Court below as having been superseded, if not actually repealed, by the latter Act, the 2 & 3 Vict. ; but it is quite clear that it was not ; merely looking at the two Acts is sufficient to show that it was not. And if there had been any doubt upon an inspection of the Acts, and upon a comparison of their provisions, that doubt is set at rest by *Clack v. Sainsbury*,¹ and by *Nixon v. Phillips*.² That Act had been, notwithstanding the subsequent Act of the 2 & 3 of the Queen, confined to the question of usury alone ; and that provision, the seventh section of the Bank Act of 1833, remains in full force to the present hour, when all protection has become unnecessary, by reason of the repeal of the usury laws.

It is also to be observed, as my noble and learned friend has remarked, that the protection was not confined to bills and notes themselves, but extended to all securities for payment of debts secured by bills and notes. That was decided in the case of *Doe d. Haughton v. King*,³ and also in *Semple v. Cornwall*.⁴

* Something has been said of *Berrington v. Collis*.⁵ * 602 Now the truth is, that in that case the Court put itself in the position of a jury, to deal with and decide upon the facts ; and it came to the conclusion upon the facts of the case, that the transaction was colourable. And we likewise, putting ourselves in the

¹ 11 C. B. 695.

⁴ 10 Exch. 617.

² 7 Exch. 188.

⁵ 5 Bing. N. C. 332.

³ 11 M. & W. 333.

position of a jury to consider the facts of this case, come to an opposite conclusion upon the grounds stated by my noble and learned friend, and which appear to me to be perfectly satisfactory to show that this was not colourable, but real and *bonâ fide*. My Lords, it has been said by Lord Tenterden, that in all questions which arise of this kind we are to look at the substance, and not at the mere outward form. They did right, therefore, in *Berrington v. Collis*, in looking at the substance, and finding that the substance was colourable, that the transaction was in fact colourable (contrary to what we clearly think in this case), they disposed of that case differently from the manner in which we now ask your Lordships to dispose of this.

My noble and learned friend has adverted to the language of Mr. Justice Patteson in his decision in *Withey v. Giliard*,¹ and to the judgment of Mr. Justice Wightman in an application arising out of the present case, viz., an application to set aside the judgment in the case of *Lane v. Horlock*, in which he came to the opinion, and acted upon it, that this was not within the proviso which still made it usury to take above certain interest in all cases of any money for loan, or forbearance of any money upon security of lands, tenements, or hereditaments, or any real estate. I have already stated to your Lordships, that happily it is not at all necessary for your Lordships to pronounce any opinion one way or the other upon the law as laid down by those two learned

*603 Judges respecting *usury. My Lords, I certainly do, however, feel strongly inclined to believe that a warrant to confess judgment does not come within the description of the provision. A judgment, no doubt, comes within that description; that is past all doubt; but a mere warrant to confess judgment, I cannot bring myself to believe comes within that description. What is a warrant of attorney to confess judgment? It is an authority given to the attorney of the creditor to receive, as the attorney of the debtor, a declaration by the creditor, the other party, the cognizee. And an action is, fictitiously, supposed to be gone through; an action brought and no defence made; there is then judgment by default. The purpose of the warrant is, that the defendant in the action, that is to say, the party acting for the defendant by virtue of the warrant, shall file a declaration against himself, that he shall receive that declaration, and that he shall enter up judgment

¹ 23 Legal Observer, 237.

as by default in that fictitious suit ; which judgment will then, no doubt, be a real security, because upon that judgment he may, to the amount of half at least of the land of the party, the cognizor, the debtor, enforce his debt. Past all doubt, without the Act 1 & 2 Vict. c. 110, respecting judgments, both in law and in equity, which judgments had not, or at least were supposed not to have that effect, prior to that statute, which was more declaratory upon that point than any thing else ; past all doubt, the judgment so entered up would be a real security, and would come within the proviso in the later Act. But not so the warrant. It does not at all follow, because a judgment, the fruit of the warrant, the judgment to which the fictitious action upon the warrant had led, would be a real security both in equity and law, that therefore the warrant itself was a real security. Suppose a warrant given on Saturday night, upon which no judgment could be entered up for thirty-six hours, and that on Monday morning for the first time judgment should be * entered up — a cognovit might be given in * 604 the interval — a cognovit would be good on a Sunday ; and if that judgment had not been entered up, the cognovit given to another party, would entirely defeat the effect of that warrant. It would be in vain to bring a fictitious action on Monday, if a judgment in another fictitious action could upon the cognovit be given to elude the effect of the former, and to take away all the effect of the benefit under the warrant so given on the Saturday. I cannot help thinking, when I look at the reported cases to which my noble and learned friend has referred, as cited on the hearing of the case in Bail Court, that Mr. Justice Wightman had in his eye this view of the nature of a warrant of attorney, and of the acting under that warrant ; and that that very much contributed to give him an impression against those who thought the case came within the proviso as to security upon lands.

Upon the whole, therefore, I have no doubt whatever in agreeing with my noble and learned friend, that this is a case in which we should reverse the decision of the Court below ; and though I feel it to be my duty to state the view I take, agreeing with Mr. Justice Wightman, without going more fully into the matter, I think it is unnecessary that we should dispose of that point either way, but that we ought to reverse the judgment, and remit it with the instructions stated by my noble and learned friend.

Mr. Wigram. — Your Lordships do not then think it necessary to reform the decree of the Court below, but remit it merely with that declaration.

THE LORD CHANCELLOR. — We never reform a decree of the Court below.

Decree reversed, with a declaration, and cause remitted.

Lords' Journals, 10th March, 1856.

* 605 • PRESTON v. LIVERPOOL, MANCHESTER, &c. RAILWAY.

1856. February 28, 29; March 3, 4.

COOPER PRESTON,	<i>Appellant.</i>
The COMPANY OF PROPRIETORS of the LIVERPOOL,	}						<i>Respondents.</i>
MANCHESTER, AND NEWCASTLE-UPON-TYNE JUNC-							
TION RAILWAY,							

Railway Company. Projectors' Agreement.

Where the projectors of a railway company, in order to induce a landowner to withdraw his opposition to their bill, enter into a contract with him, in which the stipulation is that the contract is to be performed by the company after the company shall have obtained an Act of Incorporation from Parliament, such contract to be valid ought to be one which might be lawfully made by the company after incorporation.

It is *ultra vires* of a corporation established for the purpose of making a railway, to enter into a covenant to pay a large sum of money to a man for not opposing the passing of the company's bill in Parliament.

C. P. was a landowner, a railway company was projected, and for the intended railway some of his land would be required. He threatened to oppose the bill. The projectors entered into an agreement with him, that "in case the company shall obtain an act of incorporation, the company shall pay to C. P. 1000*l.* for all lands required by the company for the due making of the railway, and 4000*l.* for residential injury to the estate and hall of C. P.," that a tunnel should be constructed in a particular manner through a part of his property, and that a passenger station should be made, &c.; C. P. withdrew his opposition, and the bill passed; the railway was not made nor were the lands required.

Held, that this was not a contract which on the mere passing of the bill entitled C. P. to claim from the company payment of the money.

The cases of *Edwards v. The Grand Junction Railway Company*, 1 Mylne & C. 650; and *Lord Petre v. The Eastern Counties Railway Company*, 1 Railw. Cas. 462, impugned.

THIS was an appeal against a decree of the Master of the Rolls, dismissing a bill which had been filed by the appellant, to compel specific performance of an agreement. In the year 1845, two persons named Harper and Yates, *together with *606 several others, projected a railway, to be called "The Lancashire and North Yorkshire Railway." These two gentlemen were appointed to be what was called "the Parliamentary Committee." The appellant was the owner of Flasby Hall, in the West Riding of the county of York; and the plans of the projected railway showed that it was intended to pass through part of his property there. The appellant gave notice of his intention to oppose the bill for the projected railway, and did not allow the surveyors to enter his grounds until he had received an undertaking in writing that his permitting them to do so should not prejudice his opposition before Parliament. The lands were afterwards surveyed and staked. On the 6th of February, 1846, Messrs. Harper and Yates entered into an agreement with the appellant, of which the following are the material parts:—

"Memorandum of agreement this day made between the executive directors of the Lancashire and North Yorkshire Railway Company of the one part, and Cooper Preston, of Flasby Hall, in the county of York, esquire, of the other part. It is agreed, that on the following conditions, the said Cooper Preston will and does assent to the railway being made through his property at Flasby, as laid down on the deposited plans of the said company.

"1st. That in case the said company shall, in this or any subsequent session, obtain an Act of incorporation, the said company shall pay to the said Cooper Preston, his heirs or assigns, the sum of 1000*l.* for all lands required by the company for the due making the railway; and a further sum of 4000*l.* for residential injury to the estate and hall of the said Cooper Preston.

"2d. That the tunnel and railway shall be so constructed through Mr. Preston's property, near the Low Wood, as not to damage the said wood"; in case such damage *should be *607.

done, the amount to be ascertained by certain persons specially named.

"3d. That the tunnel intended to be made through the estate of the said Cooper Preston shall be extended to the plantations next to the Black Lane, on the west side thereof; that the land through which the tunnel shall be made is to be reconveyed to the said Cooper Preston, his heirs or assigns, and to be resold over at the expense of the company.

"4th. That the company shall cause a passenger station to be made at the village of Flasby, with all requisite and proper approaches thereto; that the land required for such station and appurtenances shall be furnished by the said Cooper Preston, his heirs or assigns, at his own cost; the extent of the land to be considered according to the wants of an adequate station, and not more in any case than half an acre; that it is understood that this agreement shall not require Mr. Preston to furnish more land than is requisite for the proper making of the railway, with slopes, slidings, and station; that the company shall pay the expense of Mr. Preston's solicitor in this business, and 25*l.* for his own personal expenses."

Upon this agreement being signed, the appellant wrote to the solicitor for the company: "I hereby withdraw my dissent to your passing through my land, and authorise you to enter an assent in place thereof."

Two other projects for railways, not following quite the same line, were on foot at the same time, and, ultimately, the Lancashire and North Yorkshire Railway Company became incorporated with one of the intended companies, and the incorporated company took the name of "The Liverpool, Manchester, and Newcastle-upon-Tyne Junction Company," and obtained an Act, 9 &

10 Vict. c. 90. In December, 1846, the secretary gave the *608 appellant notice of *an intention to "enter upon your lands or the lands in your occupation, in, &c., which will be required for the purpose of the company, for the purpose of surveying, &c." The lands were accordingly surveyed. The compulsory powers of the company to take lands were at first limited to expire in July, 1848, but were afterwards extended to June, 1851. It being found impracticable to raise sufficient money for constructing the railway within the time limited, the project was, in October, 1848, given up, and in pursuance of a

resolution of the general body of shareholders then held, the unapplied portion of the subscriptions was returned.

In November, 1848, the appellant wrote a letter to the chairman of the board of directors, insisting on the performance of his contract; and in September, 1850, he wrote another letter to the same effect. In January, 1851, the appellant filed his bill, praying that the company might be directed to complete the purchase of the land, and pay him the two sums of 1000*l.* and 4000*l.*, &c., according to the agreement. The bill was at first demurred to for want of equity.¹ The cause was heard upon this demurrer before Vice-Chancellor Lord Cranworth, who offered the respondents a case at law, to try the appellant's legal rights on the agreement; but ultimately that offer was not acted on, and the cause came on before Vice-Chancellor Kindersley, who overruled the demurrer.² The bill was amended by inserting the rest of the agreement, and an answer was then put in, evidence was taken, and the cause being heard by the Master of the Rolls, on the 21st April, 1853, his Honor was pleased to dismiss the bill without costs.³ This appeal was then brought.

* *Mr. Follett* and *Mr. Southgate* for the appellant. — * 609 This was a perfect contract, mutually binding on the parties. The first sentence of the contract binds one party to pay the money and the other to give up the land, on the Act of incorporation passing. It did pass; and the stipulations at once became obligatory. The appellant would not have been at liberty to refuse compliance with it, neither can the respondents. *Capper v. Lindsey*⁴ is directly in point. There an agreement was made with one company, an amalgamation took place between that company and another; and it was held that the amalgamated company was bound by the agreement. Vice-Chancellor Lord Cranworth considered the agreement in this case to be a binding agreement, though he gave the parties an opportunity of trying its validity at law, and nothing since introduced in the amended bill or answer has varied the case. The only remedy of the appellant

¹ The bill as originally filed set forth the introductory part of the agreement; the first article, and the last words of the fourth article, "that the company shall pay the expense of Mr. Preston's solicitor in this business, and 25*l.* for his own personal expenses."

² 1 Sim. N. S. 586.

⁴ 3 H. L. Cas. 293.

³ 17 Beav. 114.

is in equity. The acceptance of the Act of Parliament was the ground on which Lord Cranworth pronounced in favour of the appellant; but the Master of the Rolls thought there must be a definite act of adoption of the contract by the company. The latter opinion cannot be sustained. On the passing of the Act the right to recover arises, *Bland v. Crowley*.¹ If the railway had been made, and it could have been shown that no residential injury was inflicted, still the agreement must have been performed: *Stanley's Case*,² which shows that it was absolute, and not conditional.

[THE LORD CHANCELLOR. — The real question is whether there has been, by these respondents, any adoption of the contract made by Harper and Yates. The mere coming into existence as a company will not make them liable.]

* 610 * There is no formal adoption necessary here, but if there was, the seeking to obtain the Act of Parliament, and the obtaining it, constitute an adoption of the contract. In truth, as Lord Cottenham shows, in *Edwards v. The Grand Junction Railway Company*,³ the incorporated company is in the same situation as the projectors. In *Stanley's Case*, too,⁴ the company tried to repudiate the whole contract, but was held to be bound by it, and so the company was held bound in *Lord Petre's Case*,⁵ though in no one of them was there any act of adoption.

That these parties could bind the future company by the contract into which they entered is shown in *Stanley's Case*, and that doctrine is recognized in *Webb's Case*,⁶ and in *Stuart's Case*⁷ (though specific performance was refused there because of the particular circumstances of the case), and in *The Eastern Counties Railway Company v. Hawkes*.⁸ Lord St. Leonards seems to treat those cases in the same manner. If the shareholders here are not bound by this contract, all these cases may be considered as swept away. *Gage v. The Newmarket Railway Company*⁹ does not affect this case, for the agreement there was to pay before entering into possession of the lands, and Lord Campbell in judgment¹⁰ distinguished that case from all others, except that of

¹ 6 Exch. 522.

² 3 Mylne & C. 773, 1 Railw. Cas. 58.

³ 1 Mylne & C. 650.

⁴ 3 Mylne & C. 773, 1 Railw. Cas. 58.

⁵ 1 Railw. Cas. 462.

⁶ 1 De G., M. & G. 521.

⁷ 1 De G., M. & G. 721.

⁸ Ante, 379, 1 De G., M. & G. 757.

⁹ 18 Q. B. 457.

¹⁰ 18 Q. B. 470.

Webb. The withdrawing of opposition to the bill is a sufficient consideration for such an agreement, *Simpson v. Lord Howden*.¹

This contract was *bond fide* entered into, and Lord St. Leonards in this House, in *The Eastern Counties Railway Company v. Hawkes*,² mentions with approval *Edwards's Case*,³ *611 as one showing how far a Court of equity has properly gone, in order to bind railway companies by *bond fide* contracts entered into, even in contemplation of incorporation. The respondents here must be taken, in point of fact, to have adopted this contract. In *Gooday v. The Colchester Railway Company*,⁴ the parties did nothing whatever, but here shares have been distributed, and money paid upon them, so that the powers of the Act have been put in exercise. Notice has been served upon the appellant that his land would be required. Now the terms of the contract are that the company shall pay 1000*l.* for all the land required by the railway. The respondents have done that which is within the words of the contract. The contract was not conditional on the land being actually taken, and evidence, aliunde, of intention, is not admissible, in order to show it to be so, *Croome v. Lediard*.⁵

The Solicitor-General (Sir R. Bethell) and *Mr. Roundell Palmer (Mr. J. Hamilton Humphreys)* was with them) for the respondents. — Some decisions of the Courts below must be considered in this case, for there is a conflict between them; and the status and rights and liabilities of a corporation are not, as they certainly ought to be, the same in Courts of equity as in Courts of law.

Take a case with circumstances of the kind which exist here. The Legislature creates a company for a particular purpose, which is a public purpose, and gives it powers for that purpose. The Act creating the company is a public Act, and the performance of what it authorises is committed to certain directors, who are thereby charged with a public duty; in one sense they are trustees, *Bennett's Case*.⁶ All of the powers thus given *612 may be rendered impossible of execution by extravagant agreements made with A. and B. before the company comes into existence. It was upon the principle that what the Legislature

¹ 9 Clark & F. 61.

² Ante, 374.

³ 1 Mylne & C. 650.

⁴ 17 Beav. 132.

⁵ 2 Mylne & K. 251.

⁶ 5 De G., M. & G. 284.

had thus ordered should not be incapable of execution, that the agreement made by two companies in the case of *The East Anglian Railways Co. v. The Eastern Counties Railway Co.*¹ was declared void. That case, and *Salomons v. Laing*,² decided that a company must apply its funds exactly as directed by its Act, and in no other manner. The case of *Lord Petre v. The Eastern Counties Railway Company*³ is an instance of an opposite sort, and the terms of the agreement there ought to have shocked the moral sense of the Court. Had such an agreement been entered into by the directors, after the passing of an Act, and had any shareholders come into Court to complain against it, it never could have been enforced. How then could it be argued that it might be enforced, when it was made by those who projected the company, who had at the time no authority to bind a future company, and who did not, even when the Legislature incorporated that company, receive any authority to bind it. A contract made under such circumstances is one made by speculators, who may have no interest in the company, and who make it under the notion of an agency, before the company, of which they affect to be the agents, has come into existence. Besides which, if the company could not make such a contract the agents of the company could not, for an agent cannot do more than his principal has authority to do. In *Macgregor v. The Dover & Deal Railway Company*,⁴ a contract

* 613 like this was described in judgment⁵ as "a * promise that an act shall be done contrary to the public law of the country, of which both parties are bound to take notice. The act is therefore illegal, and the promise that it shall be done is a void promise." *Gage v. The Newmarket Railway Company*⁶ proceeds on the same principle, so do *Colman v. The Eastern Counties Railway Co.*,⁷ *Bagshaw v. The Eastern Union Railway Co.*⁸ *The Vauxhall Bridge Company v. Spencer*⁹ does not impeach but sustains it, for there the persons held liable were really the obligees of the bond. Lord Cottenham, therefore, in *Edwards v. The Grand Junction Railway Company*,¹⁰ was wrong when he supposed that in departing from the doctrine of Sir J. Leach, in *Spencer v. The*

¹ 11 C. B. 775.² 12 Beav. 339.³ 1 Railw. Cas. 462.⁴ 18 Q. B. 618.⁵ 18 Q. B. 631.⁶ 18 Q. B. 457.⁷ 10 Beav. 1.⁸ 7 Hare, 114, affirmed 2 Macn. & G. 389.⁹ 2 Madd. 356, on appeal, Jac. 64.¹⁰ 1 Mylne & C. 650.

Vauxhall Bridge Company, he had the authority of Lord Eldon; his error in this respect has produced the greatest mischief. In truth, the two Judges had not differed on the principle, but only on its application to the facts of the case; but Lord Cottenham treated the projectors themselves and the company as identical, and said,¹ "if" they "cannot be identified, still it is clear that the company have succeeded to, and are now in possession of all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities." That was wrong in principle; it was an utter mistake to say that individuals, in their individual capacity, were identical with the corporation which was afterwards created. Suppose five hundred people subscribe for a certain object, and they authorise three persons to solicit a bill for them in Parliament, could it be pretended that they thereby authorised those three persons to enter into any contract touching the future capital of the company, which those persons in their wild desire to get the Act might fancy to be necessary. It is *614 not necessary for any purpose that contracts made by projectors should bind the company, it would be sufficient that those who made them should give pledges for their due performance. How can it be said with truth, if the company and the projectors are not identical, "that the company succeeds to and is in possession of all that the projectors had before?" How could they be so if they could not be identified?

[LORD BROUGHAM.—The meaning of that is, that if the projectors had entered into a contract beneficial to the concern, the company would take to it, and then must take to it *cum onere*.]

But the company repudiated the contract in that very case. In *Stanley v. The Chester Company*² there was no point of difficulty, for the company had in fact, as the bill alleged, adopted the previous agreement, and was therefore bound. There was no such allegation in the case of *Edwards v. The Grand Junction Railway Company*,³ but the case was put in judgment on the ground that the company had succeeded to the inheritance of the contract. That was the error of that case, the authority of which cannot be supported. *Gage v. The Newmarket Railway Company*,⁴ on the other hand, went on the clear and intelligible principle, that unless the company entered on the land there was no liability to pay for

¹ 1 Mylne & C. 672.

² 1 Mylne & C. 650.

³ 3 Mylne & C. 773, 1 Railw. Cas. 58.

⁴ 13 Q. B. 457.

it. But there are circumstances in this case which make the doctrine in *Edwards's Case*, even supposing that doctrine could be supported, totally inapplicable. Here were rival companies with different proposed lines, and after references to engineers it was not till Michaelmas, 1846, that the line of the intended railway was ultimately settled. The general committee was divided into

* 615 sections, of which Yates and Harper constituted one, * but what they did was necessarily contingent, and besides, an agreement in February, 1846, to take land for a railway, when the line of that railway was not settled till Michaelmas, 1846, could not have been other than a contingent and conditional agreement. The words of the agreement show it to be so [the learned counsel read from "It is agreed," to the end of the first article, see ante, p. 606. The last article of the agreement was afterwards referred to for the same purpose]. The case of *Webb v. The Direct London & Portsmouth Railway Company*¹ had more circumstances of real contract about it than the present, yet specific performance was refused, and the Lord Chancellor reviewing in this House² the decision in that case, most accurately stated the principles on which that refusal proceeded. Those principles directly apply to the present case, which must be governed by the rule laid down in *Harnett v. Yeilding*,³ and the relief now sought must be refused. Lord Campbell, in *Gage v. The Newmarket Railway Company*,⁴ said that under the circumstances there stated, which much resemble the present, the company could not be considered as having absolutely covenanted to pay the money whether the land was required or not, but that if the deed would bear such a construction, it was *ultra vires* and void. The actual doing of the damage is the real condition precedent to the payment of the money: *Bland v. Crowley*.⁵

There is no evidence of adoption here; the mere surveying of the land after notice was no adoption, but if there had been it would not assist the appellant. The company could not adopt a contract which it would have been *ultra vires* for the company itself to make.

* 616 * The decision of Vice-Chancellor Lord Cranworth made on the argument on demurrer⁶ cannot now be referred to

¹ 1 De G., M. & G. 521.

² Ante, 351, 352.

³ 2 Sch. & L. 549, 553.

⁴ 18 Q. B. 469.

⁵ 6 Exch. 522.

⁶ 1 Sim. N. S. 386.

by the appellant. In the first place, the first article of the agreement and the final part of the last article were all that then appeared on the bill, and they are distinctly qualified by the other articles which now appear there. In the next place, the cases of Gage, of Webb, and of Stuart, had not then been decided.

[THE LORD CHANCELLOR. — *Preston's Case*, when before me as Vice-Chancellor, must not be relied on in this argument. It was not within the scope of my duty as Vice-Chancellor to reason on the propriety of the decision of the Lord Chancellor. Lord Cottingham had laid down the rule, and I was bound to follow it in Court, though in this House, whether Vice-Chancellor or not, I should have been at liberty freely to express my opinion upon it.]

Finally, the appellant has by his own delay, from the early part of 1848, when the determination to dissolve the company was made, until January, 1851, when he filed his bill, disentitled himself to relief: *Eads v. Williams*.¹

Mr. Follett, in reply. — There is no real distinction between projectors and directors. Projectors, when incorporated, are bound by the contracts into which they entered before they were incorporated; it is just that they should be so, for in one character they do something, of which, being the same individuals, they take the benefit in another. The contract in *Simpson v. Lord Howden*² was exactly what it is here, and this House gave effect to that contract.

[LORD BROUGHAM. — The first condition here is independent of damage; the second assumes damage; but both assume that the work is to be done.]

That may be so; but it does not affect the consideration
* given in the shape of withdrawing opposition to the bill. *617
Adoption by act of the company is sufficient in a case of this kind; there need not be an adoption under the seal of the company. The delay here is accounted for by the fact that there was no denial of the right of the appellant up to the last moment, and delay does not begin to count until there has been a denial of the right.

THE LORD CHANCELLOR, after fully stating the case, said. — Mr. Preston's proposition is, that he is now entitled to those two

¹ 4 De G., M. & G. 674.

² 9 Clark & F. 61.

sums of 1000*l.* and 4000*l.* because, according to the true meaning of the agreement which the respondents entered into, it was immaterial whether the company took any part of his land, or injured his residence in any respect or not; that that was the bargain entered into; and, had it not been for that bargain, he would have opposed the bill in Parliament, and therefore might have succeeded in preventing the existence of this company; and that although in truth the company has not taken any of his land, and certainly not injured his residence, because the railway has never been formed at all, still he is entitled to these two sums.

A contract was entered into, not between Mr. Preston and the company, but between Mr. Preston and two gentlemen of the names of Yates and Harper, who were called the projectors, and were endeavouring to form this company. The process of reasoning whereby Mr. Preston seeks to charge the company is this: He says, "I entered into a contract with Mr. Yates and Mr. Harper, the projectors of the company, and consequently, I have a right to assume that by my withdrawing my opposition, Mr. Yates and

Mr. Harper succeeded in inducing the Legislature to con-
*618 stitute this company; and the company * therefore comes
in esse cum onere, and must take existence with that burden attached to it, and must fulfil this amongst other contracts."

In the able argument which was addressed to us by the learned Solicitor-General, that doctrine was very much questioned. And, had it been necessary upon the present occasion fully to make up my mind on the subject, whether that doctrine is correct or not, I should have desired much further time for consideration. I am aware that that is a doctrine which was acted upon by Lord Cottenham; and the Solicitor-General indeed endeavoured to explain some of the cases, to show that he had not quite gone that length. I confess I think it must be taken that that doctrine has been acted upon in a great many cases by Lord Cottenham. And it has been acted upon in so many cases that it would be very inexpedient off-hand to say that that doctrine cannot be sustained, when one considers how much may have been done upon the faith of it. I must, however, own, that when the subject comes to be very closely examined, I think there are objections of the gravest nature to its adoption, objections which do not seem sufficiently to have pressed upon the mind of his Lordship. Lord Cottenham acted upon this principle, that the railway company was the suc-

cessor of the projectors, or the assignee, if one may say so, of the projectors, and must take existence subject to the burdens which had been contracted for by those who were the promoters of it, and to whom it owed its existence. It is manifest that that doctrine is open to great objections, for when a company is incorporated by Act of Parliament, hundreds, I may say thousands of persons from all parts of the kingdom come and purchase shares upon the faith that the Act of Parliament tells them what their liabilities are. And in what position are they placed when, upon looking for their *dividend, they are told : “ You can *619 have no dividend, because contracts to the amount of a million (for it might go to that extent) have been entered into to pay persons sums of money which will come out of your capital ; and subject to which obligations you owe your existence.” The answer that may be made to that is : “ I have had no notice of that ; I see in the Act of Parliament, which is my title-deed, that there is no allusion to any thing of the sort.” Now and then, there is on the face of an Act of Parliament, a stipulation that the lands of Mr. Johnson, or Mr. Jackson, are not to be taken without such and such payments, or such and such stipulations. Of course no complaint can be made when that is found ; but I must say, that the complaints which may really and seriously be made by persons in respect of their being bound by contracts not apparent upon the face of the Act of Parliament, are formidable to the last degree. Observe, my Lords, to what this doctrine leads. There is that case of Lord Petre, at which everybody starts when he hears it, in which there was a contract entered into by the projectors of a company, that if Lord Petre would withdraw his opposition, they would pay him 120,000*l.* for that which was not worth above 4000*l.* It may be that some of those who purchased the shares of that company were aware of that contract ; but in all probability that was not the case with the majority. If this might be done once, as in the case of Lord Petre, it might have been done with ten other landed proprietors, and there would have been above a million of the capital of the subscribers contracted away from them without any sort of knowledge upon their part, and for purposes quite foreign from those for which they subscribed. I, however, only point out this, because there may be considerations which may outweigh those which I have now mentioned, and it may *be, when the matter comes to be looked into *620

more closely, notwithstanding all those formidable objections, that Lord Cottenham's view of the case is the correct one; at all events, having been acted upon so long, it may be inexpedient hastily to depart from it. If, therefore, this case had turned upon the validity or non-validity of that doctrine, I should have desired of your Lordships further time to consider as to the course which was to be taken; but it does not.

The reasoning of Mr. Preston is this: "This was a contract entered into by the projectors, that I was to withdraw my opposition upon the terms of my receiving the sum of 5000*l.* I did withdraw that opposition, and they got their bill; they are therefore bound by that contract, and I call upon them to perform it." That would have given rise to the application or non-application of the doctrine to which I have adverted if it had been true,—if there ever had been such a contract, when truly construed, between Mr. Preston and the projectors, Mr. Yates and Mr. Harper. But I certainly concur with the Master of the Rolls, that in truth we are entitled to say there never was any such contract. The contract was not *simpliciter*, "If you withdraw your opposition the company will pay you 1000*l.* and 4000*l.*," that was only one of the terms of a complicated contract, and your Lordships must look at the whole of the contract to see what is its true interpretation.

Now let us see what is the contract. [His Lordship read its several articles.] Is that an absolute contract, or is it not all a conditional contract, that if the railway is made these terms shall be adhered to? With regard to the last three stipulations it is absurd to suppose that it was an absolute contract, unless there should be a railway made. If funds cannot be raised to make the railway, can it be gravely contended that the company did bind itself to make a railway station at Flasby? It is absurd.

* 621 It was only a conditional contract entered into upon the notion that the railway would be made. So again as to the tunnel. It cannot be gravely stated that the respondents are bound, although there is no railway, to make a tunnel under a particular wood. That would be ridiculous. Therefore, looking at the whole contract together, it is obvious that the last three terms must have been intended to be conditional upon the making of the railway. If that is so, is not the first term of the contract to be construed in the same manner also, namely, if the Act

passes, the appellant is to have 1000*l.* for all lands required by the company, "and 4000*l.* for injury to his residence consequent upon the making of the railway." That all means if there is any land taken, if there is any injury to his residence, and if there is a railway made. If the railway had been made he would not have been bound to prove injury to his property. I think it was meant that if the railway was made, it was to be assumed that it would injure his residence, and for that he was to receive this sum of 4000*l.* But it is not true to represent that the contract was made *simpliciter* that if he withdrew his opposition, and certain other things happened (which did not happen), then the respondents were to pay this money. That is a very short mode of disposing of this case; but it is the ground upon which, as I collect, from the short judgment in the Court below, the Master of the Rolls went. He thought it so clear, that he did not call on the other side to argue at all. The case seemed to him to be conclusive. I do not, however, hesitate to say, if that is not so, that even adopting Lord Cottenham's doctrine, and supposing contracts made by projectors are afterwards to be binding upon companies, still that doctrine cannot apply here, it can only be that contracts, which the railway company might lawfully have entered into after the company had been *formed, shall be binding *622 if they were entered into by those who might be considered as agents for the company before the company came into corporate existence.

In another case¹ Lord Campbell stated that a contract like this would have been *ultra vires*. That is very high confirmation of the doctrine I am now declaring; but I cannot hesitate to say, even if Lord Campbell had stated nothing of the sort, that I should have had no possible doubt that it is *ultra vires* of a corporation established for the purpose of applying the funds of its subscribers in making a railway, to enter into a covenant to pay 5000*l.* to a person for not opposing them in Parliament. To do so is entirely beyond the powers intended to be conferred, or that ever were conferred upon the directors of a railway company.

I state this because I have no wish to shrink from giving that as my opinion. I go entirely upon the other ground as to the

¹ Eastern Counties Railway Company v. Hawkes, ante, 356; Gage v. Newmarket Railway Company, 18 Q. B. 469.

construction of the agreement here, as to which I shall only make one observation. It was put as a sort of *argumentum ad hominem* that I ought not so to hold, because I held the contrary when I had to construe the agreement upon demurrer. In the first place, if I altered my opinion now, I should be bound to say so ; but when the agreement was stated to me, all these other matters were left out. It was stated to me as an agreement that if the Act passed, they would pay the 5000*l*. An authority was quoted from the Court of Exchequer which seemed to me completely to govern the case. I rather believe that I should now decide in the same way in which I then decided, if the agreement was what it was then stated to be. When the agreement is looked at with

the other terms introduced into it, they give it a new character. * I do not go upon all the other points as to the parole evidence, and other matters. It is quite unnecessary to discuss them ; it may be that they add to the case and it may be that they do not. The short ground upon which I go is, that there is no such contract as that which the parties are seeking to enforce ; that is to say, that which they are seeking to enforce as a contract is only one term of a complex contract, which single term, taken with the others, has a totally different meaning from that which, taken alone, it purports to possess.

LORD BROUGHAM. — My Lords, I take exactly the same view of this case, in all its branches, as that which my noble and learned friend has taken. With respect to what has been said of the doctrine held or supposed to have been held by Lord Cottenham in more cases than one, I am exceedingly glad that we can dispose of this case without entering into that argument and without giving our opinion as to that doctrine generally. I have more than doubts of the soundness of those dicta, I may say of those judgments of my noble and learned friend, now no more ; I have more than doubts. I think they were carrying very far, indeed a great deal too far, certain doctrines which had themselves been the subject of dispute. But I am very glad indeed that we can dispose of the present case without finally, by the authority of this House, giving our judgment upon the validity of the principles so laid down.

But with respect to this case I really entertain no manner of doubt whatever. I mean with respect to the construction of this

agreement, for I throw altogether out of view the parol evidence, and go entirely upon the contract itself.

The contention for the appellant is, that the contract must be taken to be an undertaking by the company when * called * 624 into existence by the Act of incorporation, a mere necessary consequence of that Act passing to incorporate the shareholders in consideration of Mr. Cooper Preston withdrawing his opposition to the passing of the bill into an Act. For that simple act they are to pay him 1000*l.* for the land required. But if there was no land required at all, it seems a strong thing to say that they undertook to pay him 1000*l.* on the ground of the value of the land, whether the land was required or not; and 4000*l.* for the damage done to his residence, whether any damage should be done to it or not. Now I can well understand that they might undertake to pay, and that he might stipulate to receive, 4000*l.* for damage to his residence, without considering whether damage actually was done to it or not, because it might be a guarantee against the possibility of damage. He might stipulate to have a certain sum, and they might agree to assure him a certain sum, without consideration of whether the damage would be greater or less, or whether the damage was done or not, just as they assured him 1000*l.* for the land they might take, whether the land was more or less worth that sum. But it seems a very strong supposition to make that the one party stipulated to receive, and the other party undertook to pay, 1000*l.* for the land required for the railway, whether any railway was made or not, whether any land was taken or not, as well as 4000*l.* for the damage to his residence, whether any damage was done or not, consequent upon the land being taken, and the railway being driven through that land.

Observe the words of the agreement. It does not say 4000*l.* for the residential injury done to the estate. If it did, though an argument might not be unfairly maintained, that the 4000*l.* were to be paid in the event of any injury being actually done; yet I go so far with the * appellant's construction, and * 625 against the respondents, as to agree that the 4000*l.* might be payable for residential damage, whether any damage was done or not, provided the railway had been actually made. On the other hand, if the words had been the same as to the residential damage as with respect to taking the lands, namely, and a further sum of 4000*l.* for residential injury done to the estate, or which

may be done to the estate, I should have then said the company can only mean to pay in the event of any residential injury being actually done.

As to the lands, the appellant contends in the same way that he has a right to 1000*l.*, not only whether more or less land was taken, but whether any land was required or not. I hold that to be a most extravagant construction. The words "the sum of 1000*l.* for all lands required by the company," do not *ex vi termini* mean, nor can they mean, any thing else than land which may be required by the company, provided the company should require any land. The reading of the appellant is, as if the first of the four conditions of the contract had contained these words, "1000*l.* for all lands which may be required by the company for the due making of the railway, whether the company shall ever make the railway or not, or require any lands or not, and 4000*l.* for the residential damage." Such a reading of the contract cannot be supported.

The rest of this contract throws great light, I think, upon the construction of the first clause. The first clause relates to the purchase of the lands and the injury to the residence. The second clause relates to the driving of the railway near the Low Wood, and imposes certain restrictions, in order not to injure that part of the property of Mr. Cooper Preston. Then the third clause relates to the tunnel; and the fourth to the passenger station at Flasby. Does not the whole stand upon the like, nay upon the same footing? If the railway is made, certain conditions * 626 * are imposed upon the company, and certain terms are stipulated for by Mr. Cooper Preston as to the woods. In like manner if the work takes place, there is a certain condition as to the tunnel; and in like manner there is a certain condition as to the station. In the second, third, and fourth terms of the contract there are these conditions. As in the first there is a certain condition as to the purchase of the lands required and the residential damage. I think it would not be going too far to say that you might just as well argue that the company was bound to make the tunnel, or to make the station under the third and fourth of these conditions, as to say whether the railway is made or not, and whether any land is required or not, the company is bound to pay the 1000*l.* and the 4000*l.* I take it that is a most extravagant construction, and contrary to the reading of it as a

sensible instrument. I agree with my noble and learned friend that that puts an end to all the other objections that have been raised. It is unnecessary to go further than to say that this contract, giving no opinion, as we are not bound to do, upon what might be the effect of the first clause without the other three (for I go even so far as that), and giving no opinion upon what might be the effect of the construction to be put upon the first clause if the words were materially different from the words which were relied upon in argument, it is unnecessary to go further than to say, that taking the words as they are, and the contract as it stands, I really can have no doubt that this contract does not support the contention of the appellant, and that his Honour the Master of the Rolls in the Court below has come to a right conclusion upon it.

Decree affirmed, with costs.

Lords' Journals, 4th March, 1856.

1856. February 14, 15, 18, 19, 21, 22; May 9.

SERVINGTON SAVERY, *Appellant*.

RICHARD KING and JOHN KING, *Respondents*.¹

Solicitor and Client. Purchase by Solicitor of Reversion. Costs of Appeal. Practice. Delay.

Where A. & B. join in a transaction effected with them by C., which is invalid as to B., he is not precluded from afterwards objecting to it merely because it is binding on A.

When a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, equity will require the father to be able to show that the son was really a free agent, and had adequate and independent advice.

When a solicitor purchases or obtains a benefit from a client, he must show that he has taken no advantage of his professional position, but has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger.

¹ *Smith v. Kay*, 7 H. L. Cas. 756; *Downes v. Ship*, Law Rep. 3 H. L. Cas. 353.

There can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept by the conduct of the party in whose favour it is made unaware of the invalidity of the first transaction, and has not, at the time of the supposed ratification, the means of forming an independent judgment.

J. had a life estate in certain land in Devonshire, with remainder to his sons in tail male; R. was his eldest son, S. was J.'s solicitor, to whom J. was indebted in a sum of above 9000*l*. On this sum, J. was paying five per cent. interest, and the debt was (within 950*l*.), secured by eleven policies of assurance on J.'s life, the premiums of which, as well as the principal money, were charged on his life estate. In March, 1835, it was arranged between J. and S., an arrangement to which R. (who had then only just come of age, and who was living in his father's house), assented, that a disentailing deed should be executed, and that J. and R. should then execute a mortgage to S. for 10,000*l*., with a power of sale, the difference in the amounts being made up by a further advance, the interest being reduced to four per cent., and the policies of assurance assigned to R. for his use; all this was done. In this transaction, R. had no other professional advice than that of S., who was his father's solicitor, and was also the mortgagee.

Held, that as to R., this mortgage was invalid.

J. afterwards borrowed more money from S., repayment of which was secured by charges on the Devonshire estate, executed by both J. and R., and with some of this money property was bought in Hampshire, which was conveyed to R. The encumbrances * on the Devonshire estate being thus largely increased, it was afterwards put up to sale (in order to discharge all encumbrances), but was bought in, and was ultimately purchased by S. for a sum of 23,800*l*. of which 3000*l*. were paid to R. for his use, and a small balance paid to J. In these various transactions, R. had no professional advice but that of S.:

Held, that this sale was invalid so far as R. was concerned, and accounts were directed.

The bill to set aside these transactions was not filed till 1847:

Held, that under the circumstances of this case, the delay was no answer to R.'s title to relief.

The decree of the Court below was varied, but only as to a small extent, not the material subject of the appeal:

Held, therefore, that the appellant must pay the costs of the appeal.

THE appellant was, up to 1853, an attorney and solicitor, carrying on business at Modbury, in Devonshire, and was for many years the attorney and solicitor of the respondent, John King. That respondent was, under a will made in 1809, the tenant for life of an estate called Fowelscombe, in the parish of Modbury, and having entered into possession in 1811, he resided there till 1835, when he removed to Corhampton, in Hampshire, where he kept a subscription pack of hounds, from which he derived an income of

about 1000*l.* a year. The estate of Fowelscombe was devised to trustees for the use of John King for life, with remainder to the first and every other son of the said John King successively in tail male. The respondent, Richard King, was the eldest son of John King, and attained twenty-one on the 7th May, 1835, and was then unmarried. There were, besides, a son and daughter. Richard lived entirely with his father.

Previously to March, 1835, John King had become indebted to the appellant in various sums, amounting together to about 9667*l.* 16*s.* 8*d.*, secured by mortgage of his life estate in Fowelscombe, and also by policies of assurance * on his life, * 629 amounting in the whole to 8700*l.*, the premiums on which, amounting to 309*l.* 18*d.* 7*s.* per annum were payable by John King. The rents of these estates amounted to about 900*l.*, and were more than sufficient to satisfy the interest on such mortgages and premiums of insurance, which in the whole amounted to about 790*l.* On the 21st February, 1835, the appellant went on a visit to John King, at Corhampton, where he remained until the 9th March.

The interests of the respondents in the devised estates and the appellant's mortgage thereon were often the subjects of after-dinner conversation between the appellant and one or both of the respondents. It was arranged that the entail should be barred, and that the appellant (whose securities bore interest at five per cent.) should procure 10,000*l.* at four per cent., to enable John King to pay him off. This sum was to be advanced upon a mortgage of the fee of the devised estates.

On the 14th March, 1835, the appellant sent the following letter to John King : —

“ I have this day looked into your late uncle's will, and I find the Fowelscombe property is settled to you for life, and to your sons in tail male ; and in case of your having no male heir, or such dying under age or in your lifetime, without a recovery being suffered, the property goes off to another family. I should, therefore, advise that you and Richard should, without any loss of time (if he be of age), join in suffering a recovery, which would enable him at once (subject to your life interest) to give the property by will to his brother or sister, or to do, in fact, what he pleased with it. This you understand will effectually prevent the property going away from his sister, in case his brother John and himself should

die unmarried and without issue. In case of Richard's death in your lifetime, without a recovery, * and John's dying under age, the sister could not possess the property ; and I think it, therefore, most desirable the recovery should be suffered immediately. The uses of this recovery may be as you and Richard think proper (that is to say), either settled to you for your life (as is now the case), with remainder in fee simple to Richard after your death, thereby barring all risk of the property going away from the family ; and in this case the insurance on your life must be kept up by you, as now done, to secure the sum due from you at your death, or the uses may be declared to secure the same on the property, and subject thereto in fee to Richard ; and in this way you may keep up the insurance, so as to secure the whole sum again at your death to Richard, and thereby save in interest about 100*l.* per annum. This will be the least expensive mode of proceeding, and be more desirable to all parties. As to the sale of the estate, you are quite aware that it is a most desirable property ; and although the money would give a larger income, I confess were I you and Richard, I should be more inclined to keep it ; and if you come to the above arrangement, I see no reason why you should not do so. However, the recovery being suffered, you and Richard can then do as you may both think best ; but as this is of consequence to your family, I do advise most strenuously that no time be lost to secure the property. Life is very uncertain ; and the death of the two boys in your lifetime, without a recovery, would leave Mrs. and Miss King deprived of that estate which is now in your and his power to avert. I write this with a view only to the benefit of your family, and I hope you will both give it your best consideration." On the same day the appellant informed Mr. Shortland, his conveyancer, of his intention to send instructions for the disentailing deeds on an early day in the next week.

* 631 On * the 18th March, 1835, the appellant sent to Mr. Shortland a letter, from which the following is an extract :—

" I also send you the last deed of further charge to me, which fully recites the original mortgage and subsequent further charges to me, and as you will perceive there is some interest, about 300*l.*, I think, due, and I am to pay or advance somewhat more very soon, I will thank you to draw the necessary deed of uses ; and as it is intended that the property should be made in the first place subject to the 9000*l.*, and perhaps any further sum not exceeding

10,000*l.* to me, and then to King for life and his son in fee, I have thought it might save you some trouble to send you Higham's draft which you drew some years since, and which seems to me somewhat similar to the present case. By doing it as above, King and his son may keep up the whole or such part of the insurances as they may choose, so as to repay young King either the whole or a part of the insurance, as they please on the father's death. If my money remain, I shall take no more than 4*l.* per cent. Young King was, I think, of age (by birth) about ten days since, and the fact of his birth can be sworn to by many persons who were present. And I believe he was privately baptized at Holme, and a registry of it entered. He was not admitted into church until some months after his birth, and this was done at Ugborough. I conclude proof by affidavit will be quite sufficient by the mother and others. I expect King and his son will be here in about ten days; I shall therefore feel obliged by your attention to this matter as quickly as you can."

Drafts of indentures of lease and release (afterwards dated 6th and 7th April, 1835) were prepared by Mr. Shortland; and by them, Richard King, with the consent of John King, and of the appellant, and for the purpose of barring all estates tail and remainders therein in the said * devised estates, con- * 632
veyed the same unto J. S. Brooking, his heirs and assigns, to hold the same (subject to the estates and interests of John King and the appellant therein), unto J. S. Brooking, his heirs, &c., to the use of Richard King, his heirs and assigns for ever.

Drafts of other indentures of lease and release, afterwards dated the 7th and 8th days of April, 1835, were also prepared by Mr. Shortland, and by these indentures, when executed, in consideration of 9667*l.* 16*s.* 8*d.* due on the mortgages, and of 332*l.* 3*s.* 4*d.* expressed to be advanced by the appellant to the respondents, Richard King and John King, the respondents conveyed the devised estates to the use of the appellant, his heirs and assigns, subject to a proviso for redemption on payment by the said respondents, or either of them, to the appellant of 10,000*l.*, with interest at 4*l.* per cent. if punctually paid (with a power of sale on nonpayment of the debt due); and it was declared that as between Richard King, and his heirs, executors, &c., and John King, his heirs, executors, &c., but without prejudice to the appellant's rights and interest, the 10,000*l.* and interest should be

deemed the debt of John King, and his real and personal estate should be liable to exonerate Richard King, his heirs, executors, administrators, and assigns therefrom.

It was part of the arrangement come to between the respondents and the appellant that, on the execution of the mortgage for the 10,000*l.*, the policies of assurance on the life of John King should be assigned to Richard King, and a draft of such an assignment was accordingly prepared by Mr. Shortland, and was afterwards executed. It bore date 8th April, 1835.

The drafts were sent by Mr. Shortland to the appellant on the 28th March, 1835, and Mr. Shortland wrote therewith

*633 * to the appellant a letter, in which he said: "I have sent the draft of King's deed for destroying the estate tail, and mortgaging to you. As the son gives up so much without any apparent consideration, it will be necessary for you to have evidence within your power to show that no undue influence was exercised by his father, but that he (the son) fully understands what he is about, the more particularly as the money is due to you, and you are, I presume, the family solicitor; because, were the son at any future period to try and impeach the present transaction, the circumstance of the money not being now advanced, but being due from the father to you, might weigh. For your own security, I think that, if the money had now been obtained from a third party, it would have been better; at any rate, I would suggest that by way of caution you should, *quoad* this transaction, have some person concerned for the son; you of course know how far you can trust the parties with whom you are dealing, and I dare say have already turned over these matters. Nevertheless, I thought it would be as well just to point them out to you, as it would be rather an awkward thing, after you had given up the insurance, for the son to turn round on you and say that his father exercised an undue control, and that as you were his father's solicitor, as well as his, you must be deemed privy to it."

The appellant did not in any way communicate to Richard King such advice of Mr. Shortland, but sent the drafts to Mr. Kelly, a solicitor, of Modbury, to peruse on behalf of Richard King.

Mr. Kelly had never been employed by Richard King, and was not personally known to him.

The appellant gave Mr. Kelly no information or explanation as to the transaction, which it was intended to carry into

effect by the deeds, except such as was conveyed * by the * 634 drafts themselves. Mr. Kelly merely perused the deeds for the purpose of seeing that the same were in proper form, and returned them to the appellant approved.

At the commencement of the month of April, 1835, Richard King accompanied John King to Devonshire, and whilst there they stayed for a few days with Savery, and for a short time with Thomas King, the uncle of Richard King, at North Huish, about four miles from Modbury.

Previously to their leaving Hampshire, John King stated to Richard King that the object of their visit to Devonshire was, that they might execute some deeds for the purpose of cutting off the entail in the devised estates, and preventing the same going away from the respondent Richard King's sister, in the event of the death of Richard and his brother without male issue, but Richard King alleged that John King did not, previously to their arrival in Devonshire, communicate to him any thing respecting the intended mortgage, the subject of which was first mentioned to him at the house of the appellant a day or two before the 7th April, 1835; but Richard King, from his ignorance of and inexperience in business, did not comprehend the purport of what was said to him, nor the extent to which his interests would be affected thereby.

The appellant and respondents, and Mr. Kelly, met at the office of the appellant, when the deeds were produced for execution.

The following is Mr. Kelly's account of his share in the transaction:—

“What took place, as near as I can recollect, in March, 1835, or April, 1835, is as follows: The draft of the mortgage deed had been previously submitted to me for approval on behalf of Mr. Richard King, and as far as the contents of the deed went, I saw nothing objectionable, and I had returned the same to Mr. Savery approved; but * at my introduction to the plaintiff * 635 at Mr. Savery's office (never having seen him before), I thought it but fair, as he was a very young man (only having attained his majority a few weeks previously), to inquire of him, if he was aware that the effect of the business then in progress would deprive himself of his reversionary estate in the Fowelscombe property, which, but for this, he would become entitled to at the decease of his father. To this he replied, that he was not

aware that such would be the effect. I then told him, as I was a total stranger to him, I declined to take upon myself the responsibility of advising him to execute the deeds, and advised him to consult his uncle, Mr. Thomas King, of North Huish, or Mr. Barron, a solicitor at Plymouth, who, I knew, had been solicitor for some years to parts of his family. That previously to the above conversation I and the plaintiff (meaning Richard King) had retired into another room alone. None of the deeds were executed on that day. I considered my office, as solicitor to Mr. Richard King, ceased from that time, and with it my responsibility as to the whole of the transaction, both as to the mortgage and disentailing deeds, and if they were afterwards attested by me, they were so merely as a witness, and not as a responsible adviser of any of the parties. I have kept no copy of the drafts, and I have no charges in my books for attendances in the matter or otherwise, except a charge for 2*l.* 2*s.* for perusing the draft, mortgage, and disentailing deed, which was paid to me by the defendant, Servington Savery, on the 12th day of April, 1835. I understood the reason for calling on the plaintiff to execute the disentailing deed was, for the purpose of giving the defendant, Servington Savery, a mortgage in fee of the Fowelscombe estate, instead of the subsisting mortgage of the defendant, John King's life interest, I believe 10,000*l.*, in order to save the expenses * 636 * of keeping up life insurance for the security of the mortgage. Some allusion was made to policies of assurance effected on the life of John King, but I never saw any deed in relation thereto, nor had I any draft of assignment sent to me to peruse on behalf of Richard King. This is all I can recollect of the transaction."

The disentailing deed was accordingly given to Richard King to show to his uncle, Thomas King, who read it, and advised Richard King to consult Mr. Andrews, a solicitor, on the subject, and Richard King expressed to the appellant his desire that Mr. Andrews might be consulted. The disentailing deed (but not the mortgage deed) was sent to Mr. Andrews, who, through the appellant, addressed a letter to Richard King, in which he said: "I have perused the deeds of lease and release left with me, bearing date the 6th and 7th of April instant, and executed for the purpose of barring your estate tail in Fowelscombe, and other lands, under the will of your late grandfather, and I find the effect of them to

be merely this: That (subject to the life estate of your father under that will) the property, after enrolment of the deeds within six months, becomes vested in you in absolute fee simple, so that you may dispose thereof by deed or will in any manner you may think proper, in reversion of your father's life estate, which you could not otherwise have done until after his death, his consent being necessary to enable you to bar the entail; and further, if you should die without making any disposition by will or otherwise, the estates would descend to your own right heirs, instead of passing to the persons in remainder under your grandfather's will, so that to yourself this proceeding gives a power you did not before possess, and without depriving you of any thing."

The appellant sent this letter to Richard King at the *house of Thomas King, and wrote therewith, saying: * 637 "Mr. Andrews returned home last evening, and I immediately sent him the deeds for his perusal. For your satisfaction, and that of your friends, I enclose his opinion of them, which I think you will find precisely similar to that given by me and Mr. Kelly."

Richard King did not make any further inquiries to satisfy himself as to the real nature of the transaction, but executed the indentures of the 6th, 7th, and 8th April, 1835. He now alleged that the deeds of mortgage and of assignment of the policies were never explained to him, nor shown to any solicitor on his behalf.

The draft assignment of the policies of assurance on John King's life, as originally prepared by Mr. Shortland, by the directions of the appellant, contained a charge on the life interest of John King, with a marginal note of counsel to the following effect: "I have charged the sum which R. King may pay as his father's interest in the property mortgaged to Mr. Savery. If, however, this further charge is inserted, it will be necessary that, in addition to the common deed stamp, the mortgage stamp, for the sum within the amount by which the security is limited, should be affixed."

The charge of the premiums of the policies on the life estate of J. King was afterwards, as the appellant alleged, by direction of J. King and R. King, omitted from the assignment for the purpose of saving such stamp duties, but, by inadvertence, the recital in the deed with reference thereto was not altered. R. King now alleged that he was no party to the omission, and knew nothing of

it. The disentailing deed was duly enrolled. The assignment of the policies was executed by the appellant 1st May, 1835.

John King being considerably indebted to his bankers, on the 25th June, 1835, by letter, applied to the appellant for the * 638 loan of 1000*l.* on his bond, to pay this debt, and, * in answer, the appellant wrote, 1st July, 1835, a letter, in which he said : " There is but one way in which it can be managed, and that is, by transferring the present security, and taking a further sum to meet your present wants. Whether Richard will consent to do this, I do not know, but perhaps by your representing your present dilemma he may consent, and in this case you should give him your bond for the amount above what is secured to him by insurance. I would recommend your stating the case to Richard at once, as something must be done ; but as I never did on the late occasion, so do I now decline advising him in the matter, as he is capable of judging for himself, and of acting as he pleases." On the receipt of this letter, John King applied to Richard King, who consented to a further mortgage of the estates for 1000*l.*, for which he was to receive his father's bond. John King at once wrote to the appellant to prepare the mortgage. This was done, and the mortgage being executed, John King received the 1000*l.*, but no bond for that amount was executed to Richard King.

In the latter part of 1836, John King wrote to the appellant the following letter : " I must explain to you that my term in this place expires at Michaelmas next ; we have, therefore, another residence to look out for at that time. As you are aware the subscription I get here for the hounds is a great part of my existence, I must not give it up, if we remain in the country. I have been consulting with Richard, and he is for selling our property in Devonshire, and getting a permanent residence here. There is a place to be sold very near here, and I think most desirable for us. I am now in treaty for it. There is a very good house, &c. Richard and myself both wish you much to come up as soon as you possibly can, as there is no time to be lost about this place, or it * 639 may slip through our * fingers. Therefore, fix any time in the next month ; the earlier the better. Let me hear from you soon, and do not be in a hurry to return, as there will be a good deal for you to do here, as all our plans must be finally arranged before you return."

In answer the appellant wrote to John King : " You will re-

member I have always dissuaded you from selling Fowelscombe, on the ground that lands have, for some time past, sold at a very low rate, and that I find Richard and yourself would sacrifice much by such a step. Every one knows it is one of the finest and most desirable properties in the county, and that it ought to sell at thirty years' value on that account. By the papers of the day, it does appear lands have risen in value, many sales have been effected at remunerating prices. If you and Richard approve of trying a sale of the property, it may be done ; and if you cannot make a fair price, you may still retain it ; for it does not appear to me that your purchasing 2000*l.* worth of property in Hants need occasion your selling the lands here, except at a good price, as you may join as you have done before, and raise the 2000*l.* on the property here ; or you may raise 1000*l.* here, and the other 1000*l.* on the estate in Hants, at 4*l.* per cent. The purchased estate in Hants, in case Richard joins you in raising 2000*l.* here, should be conveyed to a trustee, in trust for you for life, and then to Richard, for his own use, as the Fowelscombe property now stands ; so that Richard would be in the same situation with the one as the other. In case of a sale of the property here, and a purchase in Hants, the purchased estate must be conveyed in trust for Richard, after your death ; and the surplus money, after payment of the mortgaged monies, must be settled on Richard, after your death, and remain in a trustee during your life. I have explained this matter very fully and explicitly, so * that both you and Richard may understand it ; although, * 640 perhaps, I could do so better by a personal interview. To sum up the whole, I put it to this, that, in any case, Richard must stand possessed of whatever the property may be converted into, whether money or land, after your death. I have confined myself in this letter entirely to business, but will write with the accounts, as soon as I can."

The estate thus desired to be purchased was held for three lives of the manor of Exton, and the price was 2550*l.* John King wanted to raise 1000*l.* more. R. King consented to join his father in a mortgage to a Mr. Fortescue of the Devonshire estate for that sum. Another estate, called Allen's farm, was purchased by John King in a similar manner, and a further charge in favour of the appellant was executed upon the Fowelscombe property for the sum of 1900*l.* John King afterwards purchased for 455*l.*

another small property, called Winter Down, held of the manor of Exton, and that money was advanced by the appellant on the security of the joint and several promissory note of John and Richard King. R. King received no part of the money in either case, and had no professional assistance in the business. The copyhold properties were surrendered to Richard King; but (as he now alleged) he did not understand what was done, and immediately on admittance he surrendered Allen's farm to one Wilson, to secure 500*l.*, which had been borrowed from Wilson by John King, and John King received the rents of the purchased estates, and Richard King had no means of living except what he received from his father.

In 1838 Richard King was desirous of marrying, and the arrangements necessary to enable him to do so became the subject of discussion. A sale of the Fowelscombe estate was suggested, a part of the purchase money of which would produce him a present income.

* 641 * Richard King, who was earnestly desirous of marrying, consented to the suggestion, and on the 4th of August, 1838, the appellant gave him a memorandum to the following effect: "Mr. King, on sale of Fowelscombe, will allow his son to take 3000*l.* in money as his own property and for his own use. The son may then, if he can get sufficient income from Miss C.'s relatives, place same at interest at 4*l.* 10*s.* per cent. per annum, or invest it in the purchase of any property in Hants; or, on the other hand, he may yearly draw a little upon the principal in case his income be otherwise insufficient. This course will enable the son to be independent for, say at least fifteen years, even if he draws on principal, and by that time, in all probability, events may happen to place him in a better situation. The son may settle Miss C.'s own 3000*l.* on herself. He may also settle any of his property here, subject to his father's life, on her. This mode, or an allowance of income by the father, is the only thing which occurs to me. I do not advise this course, but under circumstances I see no other. — S. S." Richard King made no objection. The estate was put up for sale in September, 1838. It was divided into four lots, of which the first two were valued at 23,600*l.*, and the other two at 4500*l.* No sale was effected, and the lots were bought in, the first two at the nominal value thus put on them. In October, 1838, the appellant offered to purchase the first two

lots for 22,300*l*. Some correspondence ensued, and in November, 1838, Richard King wrote thus to the appellant: "I write you these few lines by my father, who, I hope, will be able to bring matters to a close with you concerning Fowelscombe; as regards myself, there is no one I should wish more to become the future possessor of the old place than yourself, but I had heard from my uncle there is another person who wishes to become a purchaser; who it is I do not * know; but I trust when you again con- * 642 sider it over, you will not let the few 100*l*. upon which my father now stands be the means of preventing your becoming the purchaser. Nothing would give me greater pleasure than the immediate sale, but, of course, every 100*l*., or the smallest sum (situated as I am) would be of great consequence; yet, as you know, my most earnest wish is that it should be most speedily settled, that we may be made completely happy; for our affair has not progressed in the least since you left; nor has my father mentioned the subject to me since I saw you, though nothing can be kinder than he is to me. I wish you, therefore, as the only sincere friend I have, to whom I can apply, to try and bring matters to a more decided point, as I do not see what we are to wait for, particularly if you would be kind enough to buy the place. I have not seen Hetley yet, but can do so as soon as I know any thing can be arranged, so pray do your utmost for us, and let me have a line from you to tell what success you have had."

On the 20th of November, 1838, John King came to the house of the appellant, who agreed to purchase lots one, two, and four (which last, in the appellant's valuation, had been put down at 1000*l*.), at the price of 23,800*l*., and it was arranged that the purchase should be completed before Lady day, 1839.

On the 21st November, 1838, the appellant wrote the following letter to the respondent, Richard King: "Your father and I have been on the subject of the Fowelscombe purchase the greater part of the morning. His price, 23,800*l*., including the timber. Far be it from me to depreciate the property; and, although I do really consider it 500*l*. or 600*l*. too much, as I have to pay between 300*l*. and 400*l*. barely for stamps, I have at last agreed with him for 23,700*l*., the 100*l*. being deducted for the annuity * of 50*s*. per annum, and for the chief rent, at 1*l*. 13*s*. 5*d*. * 643 per annum, which have never formed items of deduction in any of the estimates. I shall prepare the agreement which

your father will take with him for your signature, and on my getting it back, I will begin to make arrangements for settling the purchase, if practicable, at Christmas, or certainly by Lady day next; and be assured of one thing, that both Mrs. S. and myself are as anxious for your happiness as any of your friends can be; and in this purchase, I give you my word, I have overstepped the advice of all mine in order to meet yours and your father's terms. I hope and trust it will prove a happiness to you; and in case the insurances are kept up, I see no possible loss can accrue to you by the sale, but, on the contrary, your income will be much increased; but I much doubt if mine will not be considerably diminished by it. This, however, is a lottery, and we must trust to a superior head to solve the mystery. Let me hear when you wish the matter to be settled, and I will strive to accomplish it."

On the 26th November, 1838, Richard King wrote the following answer: "Your welcome letter of yesterday was most satisfactory to me; and I cannot allow another day to pass without sincerely thanking you for all you have done in my behalf, and can only repeat how obliged I am that you are actually become the possessor of Fowelscombe, though I hope (contrary to your present opinions) to make both derive equal benefit from the sale, and that dame fortune will not frown upon you, but that you may long have health and happiness to enjoy. Of course, I should like to have all settled by Christmas, if possible; but, after your great kindness to me, should not wish to put you to the least inconvenience on my account, though you must naturally believe

that I am anxious to have the purchase money paid, at
 * 644 which time I suppose my father will allow * me the sum he promised [referring to the sum of 3000*l.* before mentioned] when you were at Exton; but I cannot help thinking that he might now dive a little deeper into his pocket without feeling it. Please answer this soon, and tell me what was said on the subject when he was with you; or, if it was not mentioned. Can you say something in my letter that I can show to him, as any thing you propose will have much more weight with him than any thing from me. My father has just received the following note from Abbott: 'Dear Sir, I am going to Southampton; if at home, you will perhaps give the bearer a check.' You see by this he wishes to be paid immediately, as it was due the 24th of this month; please, therefore, send up a draft for 450*l.*, which can be

deducted out of the purchase money, as there are other things to pay for; and immediately it is received, we will send you our acknowledgments for it. Do not let it be longer than a post or two, as he must be paid."

The money so required was forwarded by a banker's bill, specially indorsed to John and Richard King.

Differences arose between the appellant and John King respecting a clock and other fixtures, and in the letters which passed on the occasion Richard King appeared to take part with the appellant. These differences were finally adjusted, and the contract of sale was executed.

On the 13th January, 1839, the appellant wrote to Richard King: "On making the purchase of Fowelscombe, I sent all the papers before counsel, and desired him to prepare the draft of conveyance, as being more satisfactory to myself than preparing it at home. He tells me that, I being the solicitor to the parties, he thinks the deed of conveyance should be perused and approved of by some other solicitor on your behalf. If you remember, in the case of the mortgage I was advised the same course, and Mr. Kelly *perused the deeds on your account: it is *645 merely as a matter of form, but as it is advised by counsel, under the circumstances of my being a solicitor, and a purchaser, I should of course wish it, and although I am putting you to a few pounds' expense by it, yet being a matter advised you will not object to it. I would therefore suggest your writing a line to Mr. Kelly, or any other solicitor you please, on the subject, and when I can get the draft from counsel, I will get it perused and settled by Mr. Fortescue on behalf of his brother, and by Mr. Andrews on behalf of the other mortgagee, and lay it before any solicitor you please for approval on your behalf before Lady day. I will send up my accounts of receipts and payments for your and your father's perusal, and the business can be then settled without any further trouble or delay."

Richard King answered on 19th January, 1839: "I have consulted with my father on the purport of your letter. He says he does not see the necessity of having the deeds of the conveyance perused by any other solicitor, particularly as it would be attended with an expense which he cannot well afford, unless it was positively necessary, but is perfectly satisfied to let it remain in your own hands. I know very little of these matters, therefore can say noth-

ing, but am convinced you will do what is right. I am very glad you are getting on with your mortgages better than you expected, but instead of the 'purchase' breaking your back, I think, and sincerely hope it will be the means of adding to it. I am now going to ask your advice privately about the purchase money, which, I suppose, when paid, will be placed in the funds, and secured to me; but what I principally wish to ask is, whether it is not usual and requisite in such cases to have trustees."

On the 22d January, 1839, the appellant wrote to Richard * 646 King: "I have received your letter, and although * you and your father are quite satisfied (and I was sure you would be) with the conveyance prepared and settled by me, I, having laid all the circumstances with the abstract of title before counsel, am bound to act as he directs; he advises that as I am the solicitor to the parties, and the purchaser, that some other solicitor on your behalf should peruse and approve of the deeds of conveyance, so that hereafter there might be no difficulty on this account, as the Court of Equity, as it is right it should do, looks at transactions of purchases between solicitor and client with a jealous and suspicious eye. I am quite satisfied so far as I am concerned individually, but having acted under the direction of counsel hitherto, I am desirous of continuing in the same course. The deeds too being (and having been) prepared by counsel, must be also satisfactory to your father and yourself on this account. I shall be glad if you will enclose in your next letter, and as soon as you can, as I expect the draft of conveyance from town almost every day, a note to Mr. Kelly, or Mr. Baron, or any other solicitor you please, requesting him to peruse and settle the draft of conveyance on your behalf. I am sure Kelly will not charge more than two guineas for doing this; and there is a ladder or ladders at Fowelscombe, a grinding stone, and I believe a walk roller, which I will take of your father at a valuation to pay this expense. I hope to get all ready within a few days of Lady day, when we will arrange as to the settlement of the business, which I think, however, will be requisite to be done here, as I should not be able to get into Hants at that time."

Richard King enclosed in a letter to the appellant a note to Mr. Kelly, requesting him to "peruse and settle the deeds of conveyance of the Fowelscombe estate to Mr. Savery on my behalf." Mr. Kelly did so, and returned them to the appellant, ap-

proved, in writing. The *appellant wrote an account of * 647 the monies which made up the purchase money; spoke of the 3000*l.* to be paid to Richard King, as if capable of producing him 135*l.* a year, and added: "The only deficiency arising is the payment of the yearly insurances; but your father promises to do this: and if he should not, I should recommend your doing so, and, if necessary, to sell any portion of the policies to meet the demand, rather than to lose the whole." Richard King wrote on 3d March to the appellant: "As you consider the best plan will be for me to have a banker's bill in London at seven days' sight for 3000*l.*, will you be kind enough to let it be paid in that way. What would you advise me to do with so large a sum, and where can I get 4½ per cent. for it? which must be the case, to make 135*l.* a year; the funds, I believe, will only give 3*l.* per cent., and of course I should not like to place it where the security is not good; I shall try if my father cannot make it 200*l.* a year, which was the sum he named in the first instance, though from your letter it appears he will actually receive a very trifling sum, and how he can have the very large income you speak of I know not. He is so very close that I have not the least idea what he has a year. Nor has he told me exactly what property there is unsold, or whether any of it is entailed on me; but from what I remember, some fields were taken from one lot to put to another to make them more compact. I hope you will not think me very troublesome for asking many questions, but things are done in such a hurry sometimes, and knowing so very little about the estate, that I confuse one with the other, so you must please excuse my stupidity."

On the 27th of March, 1839, the appellant went to Dorchester, and met John King and Richard King, who executed the conveyance, and the appellant thereupon paid into the hands of Richard King a banker's bill for 3000*l.*, which the appellant had specially indorsed, payable to the * order of Richard King, * 648 and at the same time he paid to John King the sum of 727*l.* 5*s.* 6*d.*, the balance of the purchase money, and delivered up the policies of assurance. One of these had since been sold by Richard King, in order to pay the expense of keeping up the others.

On 1st March, 1847, Richard King filed his bill (which was afterwards amended) in Chancery, against both his father and the appellant, setting forth the above facts, charging undue influence,

and praying that it might be declared that the mortgage of 8th April, 1835, and the conveyance of March, 1839, were void as against himself, and that the appellant might be decreed to reconvey and procure all necessary parties to reconvey to him, Richard King, the reversion of the said estates, subject to the life interest of John King; Richard King being willing and offering to pay to the appellant the said sum of 3000*l.*, with interest thereon, and to deal with the several remaining policies of assurance, assigned by the said indenture of the 8th day of April, 1835, in such manner as the Court should direct, or in case the Court should be of opinion that the said mortgage transaction ought not to be set aside, then that the appellant might be decreed to reconvey and procure all persons claiming under him to reconvey to Richard King the reversion in the said estates and hereditaments, subject to the said mortgage, the said respondent being willing, and offering in such case to repay to the appellant the said sum of 3000*l.*, with interest thereon.

John King likewise filed a bill against the appellant, which in substance prayed for an account. The appellant appeared, and put in his answers to both the bills.

The suit of Richard King was heard before Sir James Parker in December, 1851, and January, 1852, but no judgment was delivered by that learned Judge, who died in the month of August, 1852.

The cause was reheard before Vice-Chancellor Sir John * 649 * Stuart in January, 1853, who, by his decree, dated 25th February, 1853, declared that the indentures of mortgage of April, 1835, were invalid so far as they purported to create a charge upon Richard King's interest in the estates purchased by the appellant; that the sale of Richard King's interest in the said estates to the appellant, and the indentures of March, 1839, so far as they purported to convey Richard King's interest therein to the appellant, were invalid, and ought to stand as a security only for the sum of 3000*l.* paid by the appellant to Richard King, and interest thereon; and that Richard King was entitled to have the said indentures of April, 1835, and March, 1839, so far as they affected his interest in the said estate, set aside, upon his paying such monies and executing such assignment as thereafter mentioned. And the Court did declare that the sums of 1000*l.* and 3500*l.* paid by the appellant in discharge of the mortgages of the 24th day of October, 1835, and the 14th day of February, 1837, and also the sum of 1900*l.* secured by the mortgage of the 29th day of Septem-

ber, 1837, and the sum of 455*l.*, the amount of the joint promissory note of Richard King and John King, with interest thereon from the death of John King, ought to be charged for the benefit of the appellant, upon the reversion in fee simple of Richard King; and accounts were ordered on the footing of this decree.¹

The Solicitor-General (Sir R. Bethell) and Mr. Willcock (Mr. F. T. White was with them) for the appellant. — The decree here is erroneous in form, as it sets aside only part of a contract, that which relates to the sale by the son, while it confirms the contract with the father. This in fact amounts to making a contract of a different * sort, a thing which equity cannot * 650 do. Besides which, in neither mode of treating the case, can the appellant be replaced, as equity requires that he should be in the same situation as before, for one of the policies effected to secure payment of his debt has been sold; and, in addition to all this, the decree is defective in not directing that allowance shall be made to the appellant for the money he has expended on improvements in the estate. The transaction itself was perfectly proper, and the conduct of Richard King since executing the mortgage has been in many respects a ratification of what he then did. The tenant for life and the remainder-man were entitled to make an arrangement of this kind, and equity will not interfere with the terms of it where fraud cannot be alleged. It cannot be alleged here. The Court will not view a transaction of this kind in the light of an ordinary sale of a reversion by a remainder-man, but as a family arrangement, as to which there might be motives which a Court of equity could not reach: *Tweddell v. Tweddell*,² *King v. Hamlet*.³ Here the remainder-man received a direct benefit; he was residing with his father, was supported by his father, and was enjoying through his father's means all the pleasures and comforts of life. One direct effect of the mortgage was to reduce the interest payable by the father to the extent of 100*l.* a year, and the son must have received some benefit from that reduction. The effect of the mortgage has been misstated by Mr. Kelly; it did not deprive Richard King of the estate, it only made it chargeable with a debt of 10,000*l.*; and it has already been shown that he must have received a benefit from the trans-

¹ 1 Smale & G. 271.

² 2 Mylne & K. 456, 3 Clark & F. 218.

³ Turn. & R. 1.

action. The intentions of the parties may be gathered * 651 from the correspondence, and that entirely *relieves the appellant from any imputation of having taken an unfair advantage of his situation to obtain a benefit for himself. Admitting therefore the full force of the rule which requires a solicitor when purchasing from a client, or a trustee when dealing with a *cestui que trust*, to act with the greatest degree of fairness, the appellant here has observed that rule. *Hunter v. Atkins*,¹ and *Holman v. Loynes*,² show that under circumstances such as exist here there is no ground for imputing what has been done.

In Sugden on Vendors and Purchasers,³ it is said: "The rule does not apply to a sale by a father, tenant for life, and his son, tenant in tail in remainder, for they form a vendor with a present interest, and meet a purchaser with the same advantage as if a single person had the whole power over the estate"; *Wood v. Abrey*.⁴ Such a sale was there treated as invalid, but it was on the grounds that the vendors were under the pressure of distress, that advantage was taken of it, that they had no advice, and that the price given was plainly inadequate, which cannot be alleged here. In *Cooke v. Burtchaell*,⁵ the doctrine of undue influence was declared to be one on which the Court could not satisfactorily act without clear evidence of facts, because it was impossible to measure the influence of a father over a son, and in that case the matter was treated as a family arrangement, and not as a case of the sale of a reversionary interest. That case and the present very strongly resemble each other in circumstances. On the other hand, this case does not in the least degree resemble that of *Archer v. Hudson*,⁶

which will be relied on by the other side, for there a young * 652 lady, * two months after she came of age, entered into a bond to the bankers of her uncle, who had brought her up, to secure to them the payment of the floating balance he owed them. She was under no obligation to do this; it was not a matter of family arrangement, and she did not receive any benefit whatever from the transaction. These differences render that case entirely inapplicable to the present.

[THE LORD CHANCELLOR. — The father seems to have had the whole benefit of the transaction. Neither all nor the larger part

¹ 3 Mylne & K. 113.

⁴ 3 Madd. 417.

² 4 De G., M. & G. 270.

⁵ 2 Drury & War. 165.

³ Page 324.

⁶ 7 Beav. 551.

of the purchase money went to the son, but it was all absorbed by the debt of the father. Is such a transaction warranted by the authorities?]

That fact did not affect the appellant, who has throughout acted openly, and has paid a fair value for the property. The delay here and the subsequent conduct of Richard King constitute an answer to the claim.

Mr. Bacon and *Mr. Follett* appeared for the respondent, Richard King, and *Mr. Malins* and *Mr. Nichols* for John King.

THE LORD CHANCELLOR observing that the interest of these two respondents was the same with regard to this appeal, said that the House would only hear two counsel, and the respondents must settle between themselves which should be heard.

Mr. Bacon and *Mr. Follett* addressed the House. — It is no valid ground for impeaching the judgment in this case that the appellant cannot be put into precisely the same situation as before. The Court may give special directions, such as will carry into effect what it shall deem to be the justice of the case. *King v. Hamlet*¹ shows * that the Court will not refuse relief unless * 658 the special circumstances of the case are such as to disentitle the party to ask for it.

It may be admitted that equity will not look too narrowly into family arrangements, but it will not permit a tenant for life wrongfully to charge the inheritance, even under pretence of benefiting it; *Caldecott v. Brown*; ² but will at least see that the transaction is one of family arrangement, and that the interests of a young and inexperienced man are not wholly sacrificed. This was not a family arrangement; the interests of the son were sacrificed. Without proper advice, Richard King was induced, for the sole benefit of his father, to burden an estate with debts not his own to three fourths of its value. The appellant, as an attorney, so far from assisting in producing such a result (especially for his own benefit), was bound to do his utmost to prevent it: *Gibson v. Jeyes*.³ Instead of that the appellant consulted only the father's interest and his own. Without the sacrifice of the son's interest

¹ 4 Sim. 223, 2 Mylne & K. 456, 3 Clark & F. 218.

² 2 Hare, 144.

³ 6 Ves. 266.

this security was not marketable, for the encumbrances more than covered the life interest of John King, and the son was therefore induced to become a party to an act which made the security marketable, but entirely at his own cost.

[LORD BROUGHAM. — There has been a delay of twelve years here before any attempt was made to set aside the transaction.]

That is so; but as to that, *Charter v. Trevelyan*¹ shows that mere lapse of time is no answer in a case of this kind. Circumstances which, in *King v. Hamlet*, operated strongly on the minds of all the equity Judges, have no application here against Richard

King, for he has not exercised any rights in virtue of the * 654 transaction which he * now seeks to impeach, except that of selling one policy of assurance, which he sold on the advice of the appellant, and the value of which can easily be made good. The conduct of the appellant does not entitle him to the favour of the Court. He did not properly explain to Richard King the real nature of the transaction; and that omission, even according to *Hunter v. Atkins*,² and *Holman v. Loynes*,³ the cases the most favourable to his argument, is sufficient to show that the transaction cannot be sustained. The property here was not resettled in a reasonable and proper mode, if the interests of the family were to be regarded; and therefore, even under the pretence of being a family arrangement, the settlement cannot stand: *Hoghton v. Hoghton*; ⁴ nor can any argument be raised as to acts of ratification, where all that the son did or omitted to do was done or omitted in ignorance, and without proper information: *Gowland v. De Faria*,⁵ *Crowe v. Ballard*.⁶

The Solicitor-General, in reply. — The combination of father and son in this appeal, as complainants against the transactions of 1835, is a mere mockery of the process of the Courts. The principle that a family arrangement is not to be looked into too narrowly, especially if the son is aware of the facts (of which there is no doubt here), was affirmed and acted on in *Wallace v. Wallace*; ⁷ and it is now a settled rule that the law contemplates bar-

¹ 11 Clark & F. 714.

² 4 De G., M. & G. 270.

³ 3 Mylne & K. 113.

⁴ 15 Beav. 278.

⁵ 17 Ves. 20. See *Mullins v. Townsend*, 2 Dow & C. 430.

⁶ 3 Brown, C. C. 117, 2 Cox, 253, 1 Ves. Jun. 215.

⁷ 2 Drury & War. 452.

gains between the tenant for life and the remainder-man, and will not interfere as to such bargains, except where fraud has been practised. No fraud whatever has * been practised * 655 here; and though the money advanced went perhaps directly into the pocket of the father, the son, who lived with him, and, without labour, enjoyed all the comforts and pleasures of the position his father maintained, really had the benefit of the advances, and cannot now be heard to impeach what was done in order to obtain them.

1856. May 9.

THE LORD CHANCELLOR moved the judgment of the House. After fully stating the facts and the pleadings, his Lordship proceeded thus:—

It is hardly necessary to say that where any person seeks the aid of a Court of equity to enable him to get rid of the effects of deeds which he has executed, the burthen of proof is on him to make out a case for such intervention. The question here is, whether the plaintiff has made out such a case, that is, whether the circumstances attending his concurrence, first in the mortgage and afterwards in the sale, were such as entitle him to treat what was done as a fraud or imposition, and so not binding on him.

The doctrine of equity on this head is well established. The legal right of a person who has attained his age of twenty-one to execute deeds and deal with his property is indisputable. But where a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, a Court of equity expects that the father shall be able to justify what has been done; to show, at all events, that the son was really a free agent, that he had adequate independent advice, that he was not taking an imprudent step under parental influence, and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it.

So, again, where a solicitor purchases or obtains a benefit * from a client, a Court of equity expects him to be able to * 656 show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interest

as he would have done in the case of the client dealing with a stranger. This duty exists on the part of the solicitor in all cases where he is dealing with any client, but of course, where the client is a very young man who has only just attained his majority, and who is so far unemancipated as to be still living under his father's roof, as part of his family, the duty is, if not stronger, at all events more obvious.

Now what is here contended for is (applying ourselves first to the mortgage) that it was obtained from Richard, the plaintiff below, by the two defendants below, in violation of both these principles ; that in order to suit the purposes of the father and of the solicitor, the son was induced by them, within a month after he came of age, to burthen his inheritance with a mortgage to the amount of nearly half the value of the estate, for which he received no consideration whatever ; and that he did this without having the benefit of any adequate independent advice to explain to him the consequences of what he was doing, and fairly to put him on his guard. That he received no consideration for his concurrence in the mortgage is clear, for it was made to secure a debt contracted by his father, for his own purposes, before the son attained his majority. It is true, indeed, that this debt amounted to only 9667*l.* 16*s.* 8*d.*, whereas the mortgage was for 10,000*l.*, and the difference, 332*l.* 3*s.* 4*d.*, is stated on the face of the deed to have been paid to the father and the son. But no evidence

was given tending to show that any part of this sum * 657 actually came to the hands of the son. And the * reasonable inference is, that it did not, more especially as, in the deed of the 8th of April, whereby the policies were assigned, the whole sum of 10,000*l.* is stated to be the proper debt of the father.

But then it was contended that, as part of the arrangement was, that the interest on the father's debt, which had theretofore been paid at the rate of five per cent., should be reduced to four per cent., this would be a saving of 100*l.* per annum to the father ; and as the son made part of the father's family, it was argued that this was a substantial benefit to him as well as to his father. This, however, cannot be treated as a valuable consideration for the son ; for the father was under no obligation to continue him as part of his family. And though where, when an eldest son comes of age, and an arrangement is made of the family property, for the general benefit of its members, a Court of equity does not nicely scan

its terms, or inquire whether each party has had a due share of benefit, yet such a doctrine does not apply where the whole arrangement consists in a transaction by which the son, without consideration, gives up valuable rights to his father. I must not be understood as questioning the position that a son may give up all or any portion of his property to his father without consideration. Undoubtedly he may do so ; but then it is incumbent on the father, accepting such a benefit, to satisfy the Court before which the transaction is impeached that the son fully understood what he was doing ; that no artifice or contrivance was made use of to induce him to do the act complained of, and that the son had competent means of forming an independent judgment. The father is bound to make this out ; and this brings us to the second point.

Has the appellant made out that in this case Richard had the means of thus forming an independent judgment ?

* In order to come to a just conclusion on this point, we * 658 must look to the facts as disclosed by the pleadings and evidence in the cause.

Richard attained his majority on Saturday the 7th of March, 1835. At that time Savery was on a visit at the house of John King, the father, in Hampshire. His visit commenced, according to the statement in his second answer, on or about the 21st of February, and he returned home to Modbury, in Devonshire, two days after Richard had come of age, namely, on Monday the 9th of March. On the Saturday following his return, namely, on Saturday the 14th of March, Savery wrote a letter to Mr. Shortland, a gentleman at the bar, in London, whom it appears Savery was in the habit of consulting, and employing as his conveyancing counsel ; and in that letter these words occur : " I will send you instructions for King's disentailing deeds early in next week, and must claim your early attention to them." On the same day he wrote to John King, the father, the letter on which so much reliance has been placed. [His Lordship read it.] There is some difficulty in reconciling these two letters. That to Mr. King would lead to the inference that neither the recovery, nor, of course, the mortgage, had then been agreed on. " I should therefore advise that you and Richard concur." This is not the language of a man who has already received authority to do what he was thus advising to be done. And yet Savery's letter to Mr. Shortland refers to the recovery as something already agreed on, and as

to which, apparently, there had been previous correspondence between them. I find it impossible not to come to the conclusion that the recovery had been agreed on between Savery and John King, the father, during the visit of the former in Hampshire, and

that the letter of the 14th of March was written to the father, in order that it might be shown by him to * his son,

* 659 with the view to obtaining his concurrence to the course thus recommended by Savery. Indeed the transaction, so far as relates to the recovery, was one so obviously proper, and for the interest of the whole family, that no one can question the prudence of the advice given, whether it was first suggested to the son by the letter, as the letter would seem to import, or whether, as I think must have been the case, it had been previously arranged between the father and Savery in Hampshire. Savery, in his first answer, says, that during his Hampshire visit, the extent of the son's interest in the property, and the necessity of barring his estate tail, had been spoken of. I think the conversation must have gone further, and that the recovery had, at all events between Savery and the father, been actually agreed on ; otherwise I cannot understand the language used in the letter to Mr. Shortland.

The question, however, so far as relates to the recovery, is not important, except as it may throw light on the mortgage which accompanied or followed it. What we have to decide is, whether in concurring in the mortgage Richard had all the protection which, as against his father and the father's legal adviser, he was entitled to.

Savery's visit in Hampshire lasted about a fortnight, and he states in his answer that during that period he went through his accounts with John King, and that various calculations were made with reference to a proposal of the father and son, made to him for paying off the father's debts, by raising 10,000*l.* on mortgage of the inheritance, at four per cent. This must in all probability have been done while the son was still a minor, for he only attained his age of twenty-one years on Saturday the 7th of March, and on the following Monday the visit ended. Then came the letter of the 14th, which I have already mentioned, and in

* 660 which Mr. Savery refers to the plan of charging * the money on the inheritance. This had obviously either been arranged during a visit in Hampshire, or was at once and without deliberation acceded to by the son upon receipt of the letter of the

14th of March. For on the 18th we find Savery writing to Mr. Shortland on the subject of the mortgage, that is a mortgage of the inheritance, in terms which show that the whole matter had been then determined on, and indeed which seem to import that even before that day there had been correspondence on the subject between Savery and Mr. Shortland. I allude to this passage: "I also send you the last deed of further charge to me, which fully recited the original mortgage and subsequent further charges to me, and, as you will perceive, there is some interest, about 300*l.*, I think, due, and I am to pay on advance somewhat more, very soon. I will thank you to draw the necessary deed of uses, and as it is intended that the property should be made in the first place subject to the 9000*l.*, and perhaps any further sum not exceeding 10,000*l.*, to me, and then to King for life, and his son in fee, I have thought it might save trouble to send you"—a precedent which he mentions.

The inference is irresistible on this part of the case, that up to the time when instructions were given for preparing the mortgage Richard had acted without any advice, except what he derived from his father and Mr. Savery. There is no room for supposing that he had seen or could have seen any one else to whom he could resort for assistance.

Mr. Shortland prepared drafts of the necessary deeds, that is, the disentailing deeds and the mortgage of the inheritance for 10,000*l.*, and these deeds were executed by Richard and by his father on the 9th of April.

The question is, whether before Richard had so bound * his inheritance he had been duly and properly put on his * 661 guard as to the nature and consequences of what he was doing, so as to enable him to act independently and free from the influence of his father and the family solicitor. That he had no such independent advice previously to the preparation of the deeds is plain, as I have already stated. What is the evidence as to the intermediate period, that is the time which elapsed after Mr. Savery had left Hampshire on the 9th of March, and given instructions to Mr. Shortland, and the 9th of April when the deeds were executed?

It appears that when Mr. Shortland sent the drafts of the deeds to Mr. Savery they were accompanied by a letter, dated the 28th of March, in which occurs the following passage: "As the son

gives up so much without any apparent consideration, it will be necessary for you to have evidence within your power to show that no undue influence was exercised by his father, but that he (the son) fully understands what he is about, the more particularly as the money is due to you, and you are, I presume, the family solicitor." At or very soon after this time Richard King and his father were on a visit in Devonshire to Thomas King, the uncle of Richard, who resided at Huish, which is four or five miles distant from Modbury, where Savery resided and carried on his business. Savery tells us in his answer that on the 3d of April, while Richard and his father were thus visiting Thomas, he communicated to Richard the advice which he had received from Mr. Shortland, and that Richard thereupon desired him to send the drafts of the proposed deeds to Mr. Kelly, a solicitor then residing at Modbury, which direction was accordingly complied with. Savery says that he at the same time explained to Richard the nature of the transaction, and that on or about the same

*662 day, it * was arranged that on the 7th of April the deeds should be executed. The draft of the mortgage deed having been, in conformity with the direction of Richard, submitted to Mr. Kelly, was returned by him to Savery approved, on behalf of Richard. And all the deeds were then engrossed, in order that they might be executed on the 7th, at the office of Savery, at Modbury.

On that day John and Richard King came to Savery's office, where Mr. Kelly also attended. Mr. Kelly was at that time an entire stranger to Richard King, and this is the account which he gives of what then took place. [His Lordship read the statement, see ante, p. 634, to the words, "that he was not aware such would be the effect."] It was said in the argument that that was a misrepresentation of Mr. Kelly's, and so, no doubt, to a certain extent, it was. The deed did not deprive Richard of the estate, but it would deprive him of the estate to the extent of 10,000*l*. It goes on to say [his Lordship read on to the end.]

The appellant states that, according to the suggestion of Mr. Kelly, he gave the deeds to Richard, that is, the mortgage deed and the disentailing deed, in order that he might show them to his uncle, Thomas King. And two days later, namely, on the 9th of April, John and Richard came to stay with Savery, on a visit, Richard bringing with him the deeds, which were then executed.

On these facts, then, can your Lordships see that due protection was thrown around Richard King; that the various suggestions which would occur to the minds of men of mature age and business-like habits, as to the prudence of the course which he was about to take, had been fairly presented to his mind, and that nevertheless he chose, for the purpose of relieving or assisting his father, to burthen his inheritance in favour of Savery, with the 10,000*l.* * due to Savery from the father? It is impos- * 663 sible to answer this question in the affirmative. The burthen of proof is on the father and Savery. What passed between Thomas King, the uncle, who is now dead, and his nephew cannot be ascertained. Savery says that Richard told him his uncle saw no objection to the disentailing deed, or to the mortgage, and he adds his belief that the uncle advised him to consult Mr. Andrews, a solicitor of eminence, on the subject. This advice was not followed, for though Mr. Andrews was consulted, yet nothing was laid before him for his opinion, except the disentailing deeds, and even they were not submitted to him till the evening of the 13th, which was after they had been executed. The only independent advice, therefore, which Richard had, was that of Mr. Kelly, who declined all responsibility, and referred him to his uncle, and of the uncle whose advice as to consulting Mr. Andrews was not followed.

I think it clear, therefore, that this transaction of the mortgage is one which, according to the principles guiding Courts of equity, on such subjects, cannot be sustained.

The next question is, whether, though not originally binding, it was afterwards made valid and obligatory by the conduct of Richard, who alone could impeach it? It was argued that he, by his subsequent dealing with the property, had cured any defects existing in the original mortgage.

As to his dealings with the property after the mortgage, his acts consisted in having concurred with his father, first, in raising several sums of money amounting to between 6000*l.* and 7000*l.* by way of charge on the equity of redemption; and, secondly, in selling the whole to Mr. Savery. With respect to the sums so raised by way of charge, the decree does not impeach them. And the question so far as relates to them is not whether they are valid, * but assuming them, as the decree assumes * 664 them, to be good and effectual charges, whether the concur-

rence of Richard in them prevents him from disputing the original mortgage for 10,000*l.*? I am of opinion that they had no such operation, for at the time of their creation Richard evidently laboured under the same ignorance with respect to his rights in relation to the first mortgage, as he was under in April, 1835. Even if he had, at the several times when these subsequent charges were created, in express terms ratified the original mortgage, such ratification would have been of no avail, unless it could be shown that he had on those occasions the means of forming an independent judgment, which he had not at the time of the original transaction. In fact, however, he had no other advice or assistance than that of his father and Savery. These additional charges were all made within two or three years after the time when he attained his majority, and while he continued to live under his father's roof as part of his family. And the same principles, which impeach the mortgage itself, must destroy also the effect of any subsequent confirmations made in the same absence of independent advice and assistance.

Just so as to the sale. Supposing for the present that the sale itself, like the charges subsequent to April, 1835, is to be deemed valid, yet it cannot, for the reasons I have indicated, have any effect in setting up the original mortgage. Richard had no intention, when he concurred in the sale, to cure any defect in the mortgage. He was not aware that any such defect existed, and he had on more professional or independent advice than that which he had on the former occasions. I see, therefore, no reason to think that the invalidity of the original mortgage was cured by any of Richard's subsequent dealings with the property.

* 665 * This therefore brings me to the next question, which relates not to the mortgage, but to the sale made in the autumn of 1838, and carried into effect by the deeds of the 21st and 22d of March, 1839. This, it will be observed was a sale by the father and son, who together were owners of the fee (subject, of course, to the charges) to Savery, their common solicitor. In such a transaction the solicitor who purchases is bound to show that he has put his clients in a situation to act independently of his influence. He must, to use the words of Lord Eldon, in *Gibson v. Jeyes*,¹ be able "to prove that his diligence to do the best for

¹ 6 Ves. 271.

the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger." Now, here several attempts had been made to sell the estate by auction, and by private contract. The sum given by Savery was 23,700*l.*, which was more than had been offered by any other person. And if the question here turned on the point, whether he had in the sale done the best for his client, and had complied with the rule as laid down by Lord Eldon, I am much disposed to think that he had. But in truth the question here does not depend on any such doctrine. This sale cannot stand against Richard, because it was made by him without his having been made aware that the original mortgage was invalid. He concurred in the sale of what, from the conduct of Savery, he had been led to suppose was a reversionary interest in an estate worth only 23,700*l.* and burthened to the extent of 20,000*l.*, or thereabouts. He was under a pressing necessity of obtaining an immediate sum of 3000*l.* to enable him to marry, and with that object in view he might well consent to a sale, to which, if he had known that as against him the charges were only 6000*l.* or 7000*l.* he never would have acceded.

* In order to sustain his purchase, Savery must show not * 666 only that he gave the utmost value for the estate, but further, that no one of the circumstances likely to influence Richard in his determination to concur or not to concur in the sale was kept from him, that he was aware of the invalidity of the mortgage, so far as he was concerned, and so knew the real nature and extent of his interest. It is obvious that this was not the case. Savery had by his conduct led Richard to believe that his interest was much less than it really was ; and there cannot therefore be set up against him a sale, which, but for the erroneous impressions thus created, might never have been made.

I am therefore of opinion that neither the sale nor the mortgage can stand, so far as Richard is concerned.

It was, however, contended that both as to the mortgage and the sale, Richard was barred by lapse of time. His bill was filed in March, 1847, that is about twelve years after the date of the mortgage, and eight or nine years after the sale. I cannot think that this delay makes any difference in the case. There is no reason whatever to suppose that Richard was guilty of any unreasonable delay, or indeed of any delay at all, after he had become aware of his right to question the validity of the mortgage ; and in those

circumstances, even if the delay had been much greater than it was, there would have been nothing to impugn his title to relief. Savery must be considered substantially to have represented to Richard that the mortgage was valid, and so consequently that the sale was binding on him; he cannot therefore complain that Richard acted on his representation till, after the lapse of several years, he discovered it to be erroneous.

The only remaining question is, as to the terms on which relief ought to be given. With respect to the mortgage it is plain * 667 that Richard must, as far as possible, put Savery * in the condition in which he would have been if no such mortgage had been made, and if his security had rested solely on the life estate of the father, and the several policies of insurance. One of the eleven policies was sold by Richard in January, 1846; it is impossible therefore as to that policy to restore Mr. Savery exactly to the position in which he stood before 1835; but he cannot be heard to complain of this, for by the arrangements which he had made or concurred in, he had led Richard to suppose that all the policies had become his own, and that he might deal with them as he thought fit; indeed he himself suggested a sale of one or more of the policies as a step which it might be advisable for Richard to take. All therefore which can be done as to the policy which was sold, is to charge Richard in account with Mr. Savery with the sum which it produced, together with interest from the time when it was sold. With respect to the other policies, Richard must assign them to Savery, after taking credit in account with him for what he may have paid out of his own funds for keeping them on foot. I say, "out of his own funds," for he is not entitled to credit for so much of the premiums as has been substantially paid out of the rents and profits of the estate; and as the sums raised by charges on the estates subsequent to the 10,000*l.* mortgage, were to a large extent applied in purchasing property in Hampshire, of which Richard has had the benefit, the rents and profits of that property may well be considered as coming in the place of the rents of the estate in question, which constituted the first fund for keeping on foot the policies. All these arrangements are effectually provided for by the decree, which thus secures to Savery, so far as the nature of the case admits, the full benefit of his original mortgage.

Then as to the sale; the sum which by arrangement be-

tween the parties was paid to Richard on completion of * the purchase, was 3000*l.* The decree properly charges * 668 him in account with that sum, together with interest at four per cent. And the decree further provides, that on the death of John, the father, the charges created subsequently to the mortgage for 10,000*l.* shall become charges on the inheritance, with interest at five per cent from that time. I do not think that is the correct mode of dealing with this part of the subject. These subsequent charges are not impeached by the decree, and if no sale had taken place, the right of those subsequent encumbrances would not have been a right against the father for his life, and at his death against the son, but an immediate right against both, — though as between the father and the son, the former would *primâ facie*, at least be bound to keep down the interest for his life. It must further be remarked, that two sums of 200*l.* and 450*l.*, which certainly were advanced by Savery in September, 1838, and December, 1838, are by the conveyance expressly charged on the inheritance. And I can discover no reason for not giving to Savery as against both Richard and John King, the benefit of those advances as charges on the inheritance.

I therefore propose to your Lordships to declare that the decree should be varied by substituting for the declaration therein contained as to the several sums of 1000*l.*, 3500*l.*, 1900*l.*, and 455*l.* therein mentioned, a declaration that as well those sums, as also the two several sums of 200*l.* and 450*l.* advanced by Savery in September and December, 1838, together with interest on all these several sums, from the time of their respective advances, are valid charges on the fee simple and inheritance of the estate, and that as between John King and Richard King, the interest of those sums ought to be kept down out of the life interest of the former.

* This is the only point on which the decree appears to * 669 be open to objection on the part of the appellant. And as this certainly does not form the material subject of the present appeal, and the error would probably have been rectified below if the Court had been asked to correct it, I think that the appellant ought to be ordered to pay the costs of the appeal.

The Solicitor-General. — Will your Lordships forgive me for reminding you of a material point, that the contract ought not to be set aside against the son, if it be not set aside as against the father?

THE LORD CHANCELLOR. — I do not think there is any thing in that. I have provided, I think, all that that really leads to, which is no more than a variation in the decree in a matter to which I have pointed the attention of the House, namely, that I think certain charges were properly made charges upon the father for life, and afterwards upon the son. They are charges at once upon the inheritance, but I do not think the son is precluded from setting aside the transaction as against him, merely because he concurred with another person who is bound by it. That other person and Savery may settle their rights as they please between themselves. What I propose is expressly qualified in that way, that the transaction is invalid as against the son.

LORD BROUGHAM. — This case, which was before your Lordships prior to the recess, received from my noble and learned friend and myself the most constant and undivided attention during the whole of the argument on both sides of the bar. It did so happen that without communication with each other, the inclination of our opinions varied from time to time in the course of that

long and very able argument, as we found, when we came * 670 repeatedly to consider it together, * previously to giving judgment. I should add, that before the recess we had come to an agreement upon the main body of the judgment, in fact upon almost the whole of it, with the exception of the question whether a change should be made in the decree to the amount of the two sums constituting the 650*l*. In dealing with the case respecting this sum, we had some little doubt with respect to the question of costs. That was really the only matter that remained in discussion between us during the interval between the day when the case was last heard and the time at which my noble and learned friend drew up his judgment, which, as my noble and learned friend well knows, I fully considered, and which is to be taken to be as much our joint judgment as if we had each delivered opinions in conformity with the reasons which have been given by my noble and learned friend.

My Lords, I think it is only necessary to add, that one of the matters upon which we have at different times entertained some inclination to doubt, was, whether the honourable and very learned Judge in the Court below had not rather a bias, — I can hardly call it a professional bias, — but a bias in respect of the profes-

sional character of the party before him. We were at different times rather inclined to think that he had laboured under that bias; but it is due to Mr. Savery that I should add my opinion, in which I believe my noble and learned friend concurs, that his character is not impeached by the result of this appeal.

Decree varied. The costs of the appeal to be paid by the appellant.

Lords' Journals, 9th May, 1856.

1856. May 26.

R. H. PERSSE, *Appellant*.

DUDLEY PERSSE and others, *Respondents*.

Though an appellant comes to London long before it is necessary to do so in order to attend the hearing of his cause, so that if then arrested, he would not be discharged, yet if no arrest is made until his cause is actually in the paper, he will be discharged out of custody.

WHEN this case was called on, Mr. R. H. Persse, the appellant, appeared at the bar of the House, in order to support a petition presented by him, praying that he might be discharged from the custody of the sheriff of Middlesex.

The governor of Whitecross Street Prison, to which place the appellant had been taken, was in attendance.

Mr. Persse was examined by the House, and stated, in substance, that his domicile was in Ireland, two miles from the town of Galway; that he was arrested on the 9th May, on a writ of attachment, issued for nonpayment of costs, pursuant to an order of Court. He was at that time living in apartments, in Albany Street, Regent's Park, taken by him for the purpose of enabling him to be present at the hearing of the appeal he had brought against a decree of the Lord Chancellor of Ireland. He came over for this purpose to England, on the 14th or 15th of January. He had then to part from his old solicitors, and to arrange with new

solicitors. He expected his appeal to be heard in March, and it would have been heard then but for the discussion on the Fermoy peerage. It was afterwards expected to be heard in April; and then he received notice to attend on the 22d of this month (May). He had stayed in London solely on account of this appeal.

Mr. Blake, the solicitor who had issued the attachment, was then examined. He had acted under the directions * 672 * and on the information of Mr. O'Connor, the solicitor in Ireland for the respondents. He was informed, and had reason to believe, that the appellant had left Ireland for the purpose of avoiding service of process, and had made over his property there to another person. Proceedings had been taken to exemplify the decree in this country; and it was only in March last that the residence of the appellant here had been discovered. At the time of issuing the attachment witness did not know that the cause was fixed for hearing.

Mr. Persse, the appellant, recalled; denied having gone away from Ireland to avoid process; and declared that the only occasions of his being in this country had been those when his presence here was required with reference to this cause.

THE LORD CHANCELLOR said that it was an invariable rule, applicable to all the superior Courts, that however desirable it might be for parties to attend the hearing of their causes, they could not be protected in doing so to the extent of needlessly interfering with the rights of others; yet when their attendance was *bond fide*, they were entitled to be privileged from arrest. Of course some latitude must be allowed in a case where a person was not resident in the city where his cause was to be heard; for he could not exactly tell when that cause might come on. Here the appellant came to this country in January; that was not a reasonable time; and if he had been arrested then or in February, he could not have claimed his discharge; but he was not arrested till his cause was actually in the paper for hearing. Though the circumstances attending the appellant's residence here were calculated to awake suspicion, yet, at the last, his presence in London might be attributed to the desire to attend the hearing of his cause. On that ground the House would order him to be discharged.

* 673 * But as it appeared that the solicitors had some reason to believe that the appellant had come here to render process against him or his property unavailable, the House, though it

acted on the rule of privilege in favour of the appellant, would not treat them as persons who had been guilty of a breach of privilege, requiring the interference of the House.

LORD ST. LEONARDS entirely concurred.

The appellant was ordered to be discharged from custody.

COUTURIER v. HASTIE.

1856. June 26, 27.

GUSTAVUS COUTURIER and others, *Plaintiffs in error.*

ROBERT HASTIE and another, *Defendants in error.*

Contract of Sale. Actual Existence of Article sold.

A cargo of corn was shipped by A. at Salonica in February, 1848, for delivery in London. On the 15th of May it was sold by H. a factor, who made the sale on a *del credere* commission. The contract described the corn as "of average quality when shipped," and the sale was made at "27s. per quarter free on board, and including freight and insurance to a safe port in the United Kingdom, payment at, &c. upon handing shipping documents." In fact the corn had, a short time before the date of the contract, been sold at Tunis, in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract: In an action for the price brought against the factor:

Held, that the contract contemplated that there was an existing something to be sold and bought and capable of transfer, which not being the case at the time of the sale by the factor, he was not liable.

THE plaintiffs were merchants at Smyrna; the defendants were cornfactors in London; and this action was brought to recover from them the price of a cargo of *Indian corn, *674 which had been shipped at Salonica, on board a vessel chartered by the plaintiffs for a voyage to England, and had been sold in London by the defendants in error, upon a *del credere* commission. The purchaser, under the circumstances hereafter stated, had repudiated the contract.

In January, 1848, the plaintiffs chartered a vessel at Salonica, to bring a cargo of 1180 quarters of corn to England. On the 8th of February a policy of insurance was effected on "corn, war-

ranted free from average, unless general, or the ship be stranded." On the 22d of that month, the master signed a bill of lading, making the corn deliverable to the plaintiffs, or their assigns, "he or they paying freight, as per charter-party, with primage and average accustomed." On the 23d February the ship sailed on the homeward voyage. On the 1st May, 1848, Messrs. Bernouilli, the London agents of the plaintiffs, and the persons to whom the bill of lading had been indorsed, employed the defendants to sell the cargo, and sent them the bill of lading, the charter-party, and the policy of insurance, asking and receiving thereon an advance of 600*l*.

On the 15th May the defendants sold the cargo to A. B. Callander, who signed a bought note, in the following terms: "Bought of Hastie & Hutchinson, a cargo of about 1,180 (say eleven hundred and eighty) quarters of Salonica Indian corn, of fair average quality when shipped per the *Kezia Page*, Captain *Page*, from Salonica; bill of lading dated twenty-second February, at 27*s*. (say twenty-seven shillings) per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders; measure to be calculated as customary; payment at two months from * 675 this date, or in cash, less discount, at the rate * of five per cent. per annum for the unexpired time, upon handing shipping documents."

In the early part of the homeward voyage, the cargo became so heated that the vessel was obliged to put into Tunis, where, after a survey and other proceedings, regularly and *bonâ fide* taken, the cargo was, on the 22d April, unloaded and sold. It did not appear that either party knew of these circumstances at the time of the sale. The contract having been made on the 15th of May, Mr. Callander, on the 23d of May, wrote to Hastie & Hutchinson: "I repudiate the contract of the cargo of Indian corn, per the *Kezia Page*, on the ground that the cargo did not exist at the date of the contract, it appearing that the news of the condemnation and sale of this cargo at Tunis, on the 22d April, was published at Lloyd's, and other papers, on the 12th instant, being three to four days prior to its being offered for sale to me."

The plaintiffs afterwards brought this action. The declaration was in the usual form. The defendants pleaded several pleas, of which the first four are not now material to be considered. The

fifth plea was that before the sale to Callander, and whilst the vessel was on the voyage, the plaintiffs sold and delivered the corn to other persons, and that since such sale the plaintiffs never had any property in the corn or any right to sell or dispose thereof, and that Callander on that account repudiated the sale, and refused to perform his contract, or to pay the price of the corn. Sixthly, that before the defendants were employed by the plaintiffs, the corn had become heated and greatly damaged in the vessel, and had been unloaded by reason thereof, and sold and disposed of by the captain of the said vessel on account of the plaintiffs at Tunis, and that Callander, for that reason, repudiated the sale, &c.

* The cause was tried before Mr. Baron Martin, when * 676 his Lordship ruled, that the contract imported that at the time of the sale, the corn was in existence as such, and capable of delivery, and that as it had been sold and delivered by the captain before this contract was made, the plaintiffs could not recover in the action. He therefore directed a verdict for the defendants. The case was afterwards argued in the Court of Exchequer before the Lord Chief Baron, Mr. Baron Parke, and Mr. Baron Alderson, when the learned Judges differed in opinion, and a rule was drawn up directing that the verdict found for the defendants should be set aside on all the pleas, except the sixth, and that on that plea judgment should be entered for the plaintiffs, *non obstante veredicto*. That the defendants should be at liberty to treat the decision of the Court as the ruling at *Nisi Prius*, and to put it on the record and bring a bill of exceptions.¹ This was done, and the Lord Chief Baron sealed the bill of exceptions, adding, however, a memorandum to the effect that he did so as the ruling of the Court, but that his own opinion was in opposition to such ruling.

The case was argued on the bill of exceptions in the Exchequer Chamber, before Justices Coleridge, Maule, Cresswell, Wightman, Williams, Talfourd, and Crompton, who were unanimously of opinion that the judgment of the Court of Exchequer ought to be reversed.² The present writ of error was then brought.

The Judges were summoned, and Mr. Baron Alderson, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Willes, and Mr. Baron Bramwell attended.

¹ 8 Exch. 40.

² 9 Exch. 102.

* 677 * *Sir F. Thesiger* and *Mr. James Wilde* for the plaintiffs in error. — The purchase here was not of the cargo absolutely as a thing assumed to be in existence, but merely of the benefit of the expectation of its arrival, and of the securities against the contingency of its loss. The purchaser bought in fact the shipping documents, the rights and interests of the vendor. A contract of such a kind is valid, *Paine v. Meller*; ¹ *Cass v. Ruddle*.² The language of the contract implies all this. The representation that the corn was shipped free on board at Salonica, means that the cargo was the property of, and at the risk of the shipper, *Cowasjee v. Thompson*.³ The Court of Exchequer proceeded on the words of this contract, and gave the correct meaning to them. Mr. Baron Parke⁴ said: "There is an express engagement that the cargo was of average quality when shipped, so that it is clear that the purchaser was to run the risk of all subsequent deterioration by sea damage or otherwise, for which he was to be indemnified by having the cargo fully insured; for the 27s. per quarter were to cover, not merely the price, but all expenses of shipment, freight, and of insurance." In a contract for the sale of goods afloat, there are two periods which are important to be regarded, the time of sale and the time of arrival. If at the time of the sale there is any thing on which the contract can attach it is valid, and the vendee bound, *Barr v. Gibson*.⁵ The goods are either shipped, as here, "free on board," when it is clear that they are thenceforward at the risk of the vendee, or they are shipped "to arrive," which saves the vendee from all risk till they are safely brought to port, *Johnson v. MacDonald*.⁶ The intention * of the parties is understood to be declared by different terms of expression, and the judgment of the Exchequer Chamber here really violates that intention. The case of *Strickland v. Turner*,⁷ which was referred to by the Lord Chief Baron,⁸ is not in point, for there the annuity, which was the subject of the sale, had actually ceased to exist when the sale took place; there was nothing whatever on which the contract could attach; and the principles therefore on which all contracts of sale must proceed, as explained and illustrated by

¹ 6 Ves. 349.² 2 Vern. 280.³ 5 Moore, P. C. 165.⁴ 8 Exch. 54.⁵ 3 M. & W. 390.⁶ 9 M. & W. 600.⁷ 7 Exch. 208.⁸ 8 Exch. 49.

Pothier,¹ whose definitions of a sale are literally adopted by Mr. Chancellor Kent,² applied there, but they do not apply here, for here the parties were dealing with an expectation, namely, the expectation of the arrival of the cargo. As Lord Chief Baron Richards said, in *Hitchcock v. Giddings*,³ "If a man will make a purchase of a chance, he must abide by the consequences." Here, however, the chance was only that of the arrival of the cargo, and that chance was covered by the policy, for the cargo itself, as stated in the contract, had been actually shipped. Had the cargo been damaged at the time of this contract, the loss thereby arising must have been borne by the purchaser. Suppose the corn had been landed at Tunis, and had remained in the warehouse there, * it would have ceased to be a cargo in * 679 the strict and literal meaning of the word, but the purchaser would still have been bound by his contract.

The Court of Exchequer Chamber, admitting that the vendee might have recovered an average loss under the policy on this cargo, said that he could not have recovered if a total loss had occurred, and referred to an admission to that effect supposed to have been made by the present Baron Martin when arguing *Sutherland v. Pratt*.⁴ That admission does not mean what is thus supposed; and after the case of *Roux v. Salvador*,⁵ where there was a total loss, and the plaintiff recovered on the policy, it is difficult to understand how such an opinion could be entertained. A technical objection arising on the form of the policy would not affect this question. The purchaser's right on this policy would have been complete, *Phillips*,⁶ *Marshall*,⁷ and *March v. Pigott*.⁸

By what has happened here, the purchaser has been saved the

¹ Pothier, *Contrat de Vente*, pt. 1, § 2, art. 1. "Il faut en premier lieu, une chose qui soit vendue, et qui fasse l'objet du contrat. Si donc, ignorant que mon cheval est mort, je le vends à quelqu'un, il n'y aura pas un contrat de vente, faute d'une chose qui en soit l'objet. Par la même raison, si, me trouvant avec vous à Paris, je vous vends une maison que j'ai à Orléans, dans l'ignorance où nous sommes, l'un et l'autre, que cette maison a été incendiée pour le total, ou pour la plus grande partie, ce contrat sera nul, parceque la maison qui en faisoit l'objet n'existoit pas; la place et ce qui restoit de cette maison, n'étoient pas tant la chose qui faisoit l'objet de notre contrat, que des restes de ces choses. L. 57, ff. de Contr. Empt."

² 2 Kent's Com. 468.

³ 4 Price, 135.

⁴ 11 M. & W. 296.

⁵ 3 Bing. N. C. 266.

⁶ 1 Phill. Ins. 438.

⁷ 1 Marsh. Ins. 333.

⁸ 5 Burr. 2802.

payment of freight, *Vlierboom v. Chapman*; ¹ and *Owens v. Dunbar* ² shows that he would have been bound to accept the cargo. The contract here was that the cargo was shipped "free on board." To that extent the vendor was bound, but he was not bound by any further and implied warranty, *Dickson v. Zizinja*. ³

Mr. Butt and *Mr. Bovill* for the defendants in error were not called on.

THE LORD CHANCELLOR. — My Lords, this case has been very fully and ably argued on the part of the plaintiffs in error, but I understand from an intimation which I have received, that *680 all *the learned Judges who are present, including the learned Judge who was of a different opinion in the Court of Exchequer, before the case came to the Exchequer Chamber, are of opinion that the judgment of the Court of Exchequer Chamber sought to be reversed by this writ of error was a correct judgment, and they come to that opinion without the necessity of hearing the counsel for the defendants in error. If I am correct in this belief, I will not trouble the learned counsel for the defendants in error to address your Lordships, because I confess, though I should endeavour to keep my mind suspended till the case had been fully argued, that my strong impression in the course of the argument has been, that the judgment of the Court of Exchequer Chamber is right. I should therefore simply propose to ask the learned Judges whether they agree in thinking that that judgment was right.

[The Judges consulted together for a few minutes, at the end of which time]

MR. BARON ALDERSON said. — My Lords, her Majesty's Judges are unanimously of opinion that the judgment of the Exchequer Chamber was right, and that the judgment of the Court of Exchequer was wrong; and I am also of that opinion myself now, having been one of the Judges before whom the case came to be heard in the Court of Exchequer.

THE LORD CHANCELLOR. — My Lords, that being so, I have no hesitation in advising your Lordships, and at once moving that the judgment of the Court below should be affirmed. It is hardly necessary, and it has not ordinarily been usual for your Lordships

¹ 13 M. & W. 230.

² 10 C. B. 602.

³ 12 Irish Law, 304.

to go much into the merits of a judgment which is thus unanimously affirmed by the Judges who are called in to consider it, and to assist the House in forming its judgment. But I may state shortly * that the whole question turns upon the *681 construction of the contract which was entered into between the parties. I do not mean to deny that many plausible and ingenious arguments have been pressed by both the learned counsel who have addressed your Lordships, showing that there might have been a meaning attached to that contract different from that which the words themselves impart. If this had depended not merely upon the construction of the contract but upon evidence, which, if I recollect rightly, was rejected at the trial, of what mercantile usage had been, I should not have been prepared to say that a long-continued mercantile usage interpreting such contracts might not have been sufficient to warrant, or even to compel your Lordships to adopt a different construction. But in the absence of any such evidence, looking to the contract itself alone, it appears to me clearly that what the parties contemplated, those who bought and those who sold, was that there was an existing something to be sold and bought, and if sold and bought, then the benefit of insurance should go with it. I do not feel pressed by the latter argument, which has been brought forward very ably by Mr. Wilde, derived from the subject of insurance. I think the full benefit of the insurance was meant to go as well to losses and damage that occurred previously to the 15th of May, as to losses and damage that occurred subsequently, always assuming that something passed by the contract of the 15th of May. If the contract of the 15th of May had been an operating contract, and there had been a valid sale of a cargo at that time existing, I think the purchaser would have had the benefit of insurance in respect of all damage previously occurring. The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased. No such thing existing, I * think the Court of Exchequer Chamber *682 has come to the only reasonable conclusion upon it, and consequently that there must be judgment given by your Lordships for the defendants in error.

Judgment for the defendants in error, with costs.

Lords Journals, 27th June, 1856.

PERSSE v. PERSSE.

1856. May 26, 27; June 9.

R. HENRY PERSSE, *Appellant.*
 DUDLEY PERSSE and others (his second wife, and } *Respondents.*
 the children of his two marriages), . . . }

Implied Trust. Settlement. Voluntary Deed. Fraud. Pleading.

R. P. being seised in tail of the estate R., executed in 1826 a settlement, by which on the marriage of his eldest son D., it was settled (subject to an annuity to himself) on D. for life, then to the first son of D. by that marriage, "and of the heirs male of such son lawfully issuing," and for want of such issue to the second, third, and fourth, &c. sons, in the same manner, and for want of such issue to the right heirs of D. In 1827, R. P. entered into an agreement with D. by which, for valuable considerations therein mentioned, he covenanted to convey to D. (subject to a life estate in himself), to the same uses as those of the R. estate, another estate called C., if (as he expected) he should become possessed of it through the death, without issue and intestate, of a lunatic brother. A commission was taken out against this brother, who was found to have been lunatic from 1823. In 1829, the lunatic died, and R. P. took possession of the estate C. In 1830, R. P. executed a deed, by which (subject to an annuity to himself) he conveyed the estate C. to H. his second son. D.'s wife died in 1829, and in 1833, D. married again, and covenanted to settle on this marriage the estate C. to the same uses as those declared of the estate R. in the first settlement. D., his second wife, and the children of both marriages, filed a bill against R. P. and H., to set aside the deed of

* 683 1830, as fraudulent, and to have a conveyance of the estate C. * executed according to the deed of 1827; and in 1840, this House on appeal made an order to that effect. In the mean time G., a natural son of the lunatic, had raised a claim, as devisee of the estate C., under a will alleged to have been made by the lunatic before 1823. R. P. died, and G. and H. entered into an arrangement by which, in consideration of G. releasing his claims under the alleged will, H. agreed to convey to G. part of the estate C., of a certain value, and to assure to him the other part to supply any possible deficiency in that supposed value. D., his wife, and all his children, filed a supplemental bill against H. and G., to have a conveyance of the estate C. executed in conformity with the order of this House:

Held, affirming a decree of the Court of Chancery in Ireland, that H. was in the situation of a trustee for D. of the estate C., and must execute a conveyance of it, and that he was not relieved from that liability by any purchase of the alleged rights of G. If any such rights existed, he might set them up afterwards and by a distinct process, but he could not by the use of them embarrass the trust which he had accepted on taking the conveyance from R. P.

Held also, that a supplemental bill had been properly filed in this case.

Held also, that the second wife and the children of both marriages had been properly made parties to the supplemental bill.

THIS was an appeal against a decree of the Court of Chancery in Ireland, pronounced by Lord Chancellor Blackburne, on the 12th June, 1852, and made in a supplemental suit, wherein the present respondents were the plaintiffs, and the present appellant, R. Henry Persse, together with two other persons (not parties to the present appeal), were the defendants.

The supplemental bill was filed to obtain the benefit of an order of this House,¹ which reversed a decree of Lord Plunket, and declared the respondents entitled to the benefit of an indenture of the 8th December, 1827, and also declared a deed, of the 9th June, 1830, to be fraudulent and void, so far as it affected the indenture of the 8th December, 1827.

* The following brief sketch of the earlier circumstances * 684 will be sufficient to explain the nature of the present appeal:—

The father of both the appellant and respondent was Robert Persse, who was seised in tail of an estate called the Roxborough estate, described as of the value of 4500*l.* a year. The respondent, Dudley Persse, was his eldest son. In November, 1826, a settlement of this estate took place, on occasion of the marriage of Dudley Persse with Miss Katherine O'Grady (daughter of Lord Chief Baron O'Grady), when, subject to an annuity in favour of Robert Persse, it was settled to the use of Dudley Persse for life; and from and after his death, "to the use of the first son of the said Dudley Persse, on the body of the said Katherine O'Grady to be begotten, and of the heirs male of such son lawfully issuing," and so on as to the other children of the marriage; "and for want of such issue to the right heirs of the said Dudley Persse for ever."² In December, 1827, Robert Persse and the respondent executed a deed by which reciting that an estate called the Castleboy estate was then in the possession of a brother of Robert Persse, named Parsons Persse; that if this Parsons Persse should die intestate, and without lawful issue, the said estate would descend to Robert Persse; that Parsons Persse was in an unsound state of mind, and that it would be necessary for the protection of the

¹ 7 Clark & F. 279.

² See post, 695, n.

property to sue out a commission of lunacy against him ; and that at the desire of Robert Persse, the respondent had undertaken to sue out the commission, and to conduct it at his sole expense, it was witnessed that, in consideration of the matters so recited,

Robert Persse agreed that he, after the death of Parsons
 * 685 Persse, would convey to * the respondent all the Castleboy estate to the same uses as those previously settled for the Roxborough estate. This deed was immediately registered. The respondent did sue out and prosecute a commission of lunacy against Parsons Persse, who was found to have been of unsound mind (with lucid intervals) from November, 1826. Parsons Persse died in 1829 (as it was then believed) intestate, and Robert Persse entered into possession of the Castleboy estate.

In June, 1830, Robert Persse (who had not executed any conveyance of the Castleboy estate, in pursuance of his covenant of December, 1827) became a party to a deed to which his second son, R. Henry Persse, was the other party, by which, as therein stated, for valuable consideration paid to him by R. Henry Persse (the appellant), the uses of the Castleboy estate were, by Henry Persse, settled to himself for life, and after his decease to the appellant, his heirs and assigns for ever.

Mrs. Katherine (O'Grady) Persse having died in 1829, the respondent, in 1833, contracted marriage with Miss Frances Barry, and in July of that year executed a settlement, by which (among other things) the deed of 8th December, 1827, was recited, and it was covenanted that as soon as the respondent became possessed of the Castleboy estate, it should be settled to the same uses as the Roxborough estate, it being assumed at that time that the settlement of 1826 had reserved to the respondent Dudley a reversionary interest in the settled estate of Roxborough.

In 1833 Dudley Persse, his second wife, and the children of both marriages, filed their bill in the Court of Chancery in Ireland against Robert Persse, and against R. Henry Persse (the present appellant), to have the deed of June, 1830, set aside as fraudulent, and to have a conveyance of the Castleboy estate executed

* 686 in pursuance of the * covenants in the deed of December, 1827. The defendants put in their answers, and in February, 1837, the cause was heard before Lord Chancellor Plunket, who dismissed the bill. On the 7th May, 1840, his Lordship's decree was reversed by this House, the deed of June, 1830, was

declared void, and the deed of December, 1827, ordered to be carried into execution, and the cause was remitted to the Court of Chancery, to give effect to the order of this House. The Court thereupon referred it to the Master, to settle a proper conveyance, but the respondents never laid before him a draft for that purpose.

On the 28th May, 1840, by a deed made between Robert Persse of the one part, and the appellant of the other part, for the considerations therein mentioned, and subject to annuity of 400*l.* to Robert Persse for his life, Robert Persse conveyed to the appellant the Castleboy estate.

On the 6th August, 1840, a deed was executed by George Persse (a natural son of Parsons Persse, the alleged lunatic) of the one part, and Edward Doyle of the other part, by which, reciting that Parsons Persse in his lifetime had been seised in fee of the Castleboy estate, and by will dated in March, 1820, had devised the said estate to the said George Persse and the heirs of his body, and that the testator had died on the 25th October, 1829, without having revoked his will, and that George Persse had complied with "the Act for the abolition of fines and recoveries," it was witnessed that George Persse, for the considerations therein mentioned, conveyed the Castleboy estates to Doyle, &c., to the use of himself, George Persse, his heirs and assigns for ever.

On the 2d January, 1841, by two indentures between the appellant of the one part, and George Persse of the other part, after repeating the recitals of the previous disentailing deed, and further reciting that Robert Persse, the * heir at law of * 687 Parsons Persse, had entered into possession of the Castleboy estate as such heir at law ; that George Persse had brought an ejectment which had been resisted by Robert Persse and the respondent, and that in consequence of a disagreement among the jurors, there never had been a judicial determination of the same, that Robert Persse being in possession, executed the deed of 28th May, 1840, in favour of the appellant ; that the appellant and George Persse had mutually agreed amicably to adjust their conflicting claims to the said estate, it was witnessed, &c., that the appellant gave up his claim to three portions of the Castleboy estate to the value of 320*l.* a year, which portions he conveyed absolutely to George Persse, and that George Persse made an absolute conveyance of the remainder of the estate to the appellant, who granted a term thereon of one thousand years to George

Persee, in order to make good the deficiency in value of the three portions, should they fail to produce the full amount of the annuity.

Robert Persse died on the 23d January, 1850, and the appellant continued in occupation of the Castleboy estate, with the exception of that part which he had released to George Persse.

§ On the 11th November, 1850, Dudley Persse, his second wife, and the children of both marriages,¹ filed their supplemental bill in the Court of Chancery in Ireland against the appellant, and George Persse and Norton Barry, a trustee under the settlement of July, 1833, praying that it might be declared that the respondents were entitled as against the defendants to the benefit of the several decrees and proceedings hereinbefore mentioned, and that the defendants might be decreed in pursuance of the cove-

* 688 nant contained in the deed of December, 1827, * to execute a proper deed conveying the lands affected thereby to the uses and trusts specified in the settlements of November, 1826, and July, 1833.

The appellant and George Persse put in their answers, claiming to be entitled to the Castleboy estate under the will of Parsons Persse.

The supplemental bill came on for hearing before Lord Chancellor Blackburne, who, on the 12th June, 1852, pronounced a decree granting the prayer of the bill.²

¹ See post, 695, n.

² 3 Irish Ch. (by Westropp and Trevor), 196. The following are passages from the judgment of Lord Chancellor Blackburne, which were frequently referred to in the course of the argument. Having stated the facts of the case, his Lordship said:—

“Two questions have been submitted to me upon this state of facts. The first, whether I can now decree the execution of a conveyance to carry into effect the Lords’ decree, the plaintiffs having declined to have it executed by omitting to have a draft laid before the Master, as they had a right, and are therefore said to have been bound to do. By this omission they are contended to have waived their rights, and that they cannot have relief in this suit. This objection, I confess, appeared to me to be of a very serious character before I was exactly informed of the facts. I am now, however, satisfied that it is not well founded. The object of the plaintiff’s suit was to have a legal conveyance executed by the proper parties, and for that purpose it was essential that the person who had the legal estate should be a party to and obliged to execute it. The first matter to be ascertained was, in whom it was vested. Now as to this, the reply is simple. When the Lords made their order on the 7th May, 1840, Robert was tenant for life, with remainder in fee to Robert Henry under the

* In May, 1853, the appellant presented a petition to this * 689 House, praying that the cause on the former appeal might

deed of 1830; by the deed of 28th May, 1840, Robert Henry became seised of his father's estate for life. If matters had been allowed to remain so, the deed of proper parties could have been easily arranged, for Robert Henry had the whole legal estate: but the deeds of January, 1841, which Robert Henry executed, totally disabled him to execute the decree, that is, to convey the legal estate; for by the deed 2d January, 1841, in which he was a granting party, he had conveyed three denominations to George, in fee absolutely; and the remainder to him for one thousand years: so that in 1843, had the plaintiffs taken a conveyance from Robert Henry, it would have given them nothing in the three denominations, and in the rest only an estate subject to the trusts of the term of one thousand years.

"Such a conveyance, it is plain, would not have effectuated their right as established by the decree, and while Robert Persse, the tenant for life, lived, the same mode of evading the execution of the decree which had been resorted to successfully in January, 1841, would have been opened to the defendants, who could from time to time have shifted the legal estate, and occasioned the necessity of filing bill after bill to bind the legal owner by and compel him to execute the trust. The justification, therefore, of the course adopted by the plaintiffs in this cause, and their omission to have a deed executed to effectuate the decree, is founded on the conduct of the defendants who make the objection, and who, by their own act, designedly and unjustly baffled and frustrated the decree which it was their duty to have effectuated.

"This is the substantial answer to the objection: that of form, founded on the supposed waiver of their right, arising from the same cause, admits of this answer, that though they did not avail themselves of the right to have a deed settled and executed, they did not thereby forfeit the benefit of the Lords' decree, which declared their right, and for ever bound the estate of Castleboy by the trusts of the deed of covenant of 1827.

"The next objection to the relief sought by this bill is founded on the will of Robert Parsons Persse, which is proved in the cause, and by which the estate was devised to George Persse; the effect of which was to prevent the descent to Robert, and take away the whole basis of the articles of 1827, which, as well as all the rights and estates thereby contracted for, were contingent on the succession of Robert as heir at law to the Castleboy estate.

"It has been contended by Robert Henry and George Persse, that no decree can be made until the invalidity of that will is established by the verdict of a jury. In my opinion this will, whether valid, or, as Robert Henry once contended, revoked, forms no defence against the right of the plaintiffs to have the decree executed by these defendants.

"It is now established that the articles of 1827, bound Robert Persse, who became a trustee of the estate, which by the admission of all the parties in the cause, and the assumption of the decree, descended in 1829 to Robert as heir of the lunatic.

"It is further established that the deed of 1830, which conveyed to Robert Henry an estate in fee in remainder after the estate for life to Robert, his father,

- * 690 be reheard, and the order of May, 1840, reversed * or altered, but this petition was dismissed by the appeal committee.

The present appeal was then brought.

was fraudulent and void, and that Robert Henry became a trustee of that estate for the plaintiffs claiming as purchasers under the articles of 1827, and was bound by the decree of May, 1840, to execute a deed to carry those articles into execution. Being thus bound, he took the conveyance from his father on the 28th May, 1840, even then accepting a title from him as heir: this deed having given him the life estate of his father. He subsequently on the 2d January, 1841, executed the two deeds already adverted to. It is worthy of observation, that Robert Henry does not accept a grant from George, of the denominations of which he was to remain seised; but that, on the other hand, he conveys to George the three denominations which were to become his, and grants to George the indemnity term of one thousand years. It is obvious, therefore, that the parties in framing this deed were acting on the assumption that the title by descent was that with which they were dealing, as the only real subject matter of conveyance; and that it was to that title exclusively that they ascribed the actual seisin and possession of the estate. On the other hand, when the title of the devisee was dealt with, it was treated as it was, as a claim by a party who had no right to deal with the possession. In fact, and in law, Robert had entered and become seised as heir of the lunatic, this seisin was as a trustee, subject to his own use for life; and this he transferred to his son, who thus became, as he was himself, a trustee. The conveyance and grant to George, with notice of this trust, both actual and constructive, made George also a trustee, putting him, as to all he took, in the same position as Robert Henry himself. The very estate which George so acquired, and which by accepting from Robert Henry he admitted his right to grant, was the estate which had descended, and which was bound by the trusts of the articles of 1827. The case, therefore, of Robert Henry has this peculiarity, that it is that of a trustee, not setting up and claiming a title paramount to his title as trustee, but setting up a release of a contested claim, the consideration for which was his grant (in violation of his trust) to the claimant of a portion of the trust estates.

“How is it possible to maintain such a dealing to the total subversion of rights established by a decree of a Court of justice, through the medium and agency and for the benefit of the person who was in the view of this Court the protector of those rights? If this device and contrivance succeed, then without investigation, trial, or even notice to the parties interested, this decree will have been rendered nugatory and abortive, and the plaintiffs will have been disseised by their own trustee of part of the estate, and of the rest of it by a stranger to whom their trustee has betrayed their possession, that trustee having, up to the time when he thus acted, denied and impugned the title which he thus recognises and deals for.

“If there was no authority to govern the decision of a case involving such consequences as must result from the success of the contrivance which has been resorted to and adopted in this case, its very dishonesty must have been fatal to it in any Court of justice. But particularly in all its parts, and in every aspect of it, it is met and condemned by fixed and settled principles of law.

* *Mr. Rolt* and *Mr. Selwyn* for the appellant. — The * 691
deeds of January, 1841, have no relation to that of Decem-
ber, 1827. The validity of the will of Parsons Persse * has * 692

“ First, the release of George can only operate to confirm the estate of R. Henry; and as that was an estate held by him in trust, the release, instead of achieving the intended fraud, operates to confirm the estate of which he was in the actual seisin as grantee of the heir of R. Parsons Persse, the lunatic.

“ In the position in which R. Henry and George stood, if the latter had a right, he was disseised, and his release discharged the estate from the right of the releasor, and so operated to confirm not only R. Henry's estate for the life of his father, but also all the uses to which the lands were to enure on his death, by virtue of the articles of 1827. See Littleton, 521, and the note thereto, No. 1.

“ That the release of George Persse to R. Henry could only operate as a discharge, and not as a conveyance, is very plainly proved, by the passages cited from Co. Litt, 369 a. The law on this subject is clearly and explicitly expounded by Lord Redesdale, in the case of *Saunders v. Lord Annesley*. 2 Sch. & L. He says, p. 105: ‘ A conveyance by a person out of possession can only operate as a release, and if made to a stranger, where there is no privity, it can operate nothing.’ And, in page 98, he says: ‘ Whenever a person comes to the possession, either by judgment of law or by his own agreement, and holds that possession, he, and all who claim under him, must hold it according to his right to the possession, and cannot qualify it by any other right.’ The application of this in the present case is very obvious.

“ Robert was tenant for life, with remainder to the persons claiming under the articles of 1827, as purchasers for valuable consideration from him. This estate he conveyed to his son, who was bound to hold it as his father was, and could neither alter nor qualify it, to the prejudice of the purchasers in remainder. The law, to the same effect, is further laid down in page 103, in terms peculiarly applicable to the position, right, and obligations of all the parties in this transaction. Lord Redesdale says: ‘ When possession is gained under a contract by a person having a right (and this, it is to be observed, was the condition of George Persse), he can only have it such as the person has it from whom he obtains possession, and is bound to accept the possession according to that right (that is, George had it as R. Henry and Robert had held it), and was bound by the right of the persons in remainder,’ and the passage concludes by assigning the reason, ‘ and that because, according to the expression in the books, it was his folly to take possession in such a manner, instead of recovering it by lawful means.’

“ This, he says, is the language of the law; and I may add, that if George has extinguished his title as devisee and rendered its assertion difficult or impossible, he is the author of his own injury; legal rights must be asserted by legal means; it is palpable, in this case, that the means were as illegal as the design was collusive, and that that design was to evade the execution of the decree of the House of Lords, by repeating the same experiment which had been practised in 1830, and which that decree had pronounced to have been fraudulent and void.

“ I must therefore declare that the plaintiffs are entitled to have the former decree carried into execution. And for an injunction to put them into possession.”

never been finally decided, and when this case was previously under the consideration of this House, Lord Wynford¹ spoke of it as one in which there were many circumstances requiring further discussion. George Persse has title under that will. The appellant claimed title through Robert Persse against him, and these two persons were entitled in this state of things to adjust their opposing claims. They did this by George Persse conveying all his *right, title, and interest to the lands, but not by a conveyance of the land itself, to the appellant. It is clear that George Persse had a right to do this, and that what was thus done was not in contravention of the original decree or of the order of this House. The decree now appealed against is erroneous in assuming the invalidity of the will, and directing a conveyance as if no such document existed, and the order of the House of Lords proceeded on the same erroneous assumption. If a stranger had any claim under that will, he might set it up, and there is no reason why the same right should be refused to this appellant.

The Court below erroneously treated the appellant as a trustee, instead of which he is an adversary, and the direction to him to convey is given to him in the former character; but even if he had been a trustee as to the respondents, he might, under the particular circumstances which exist here, have bought the reversion from George Persse, the owner under the will. The deeds of January, 1841, constituted such a purchase. *Norris v. Le Neve*² shows that under such circumstances a purchase may be made, and *Randall v. Russell*,³ and *Hardman v. Johnson*,⁴ recognise its validity, and show that the effect of it would not be to make the appellant a purchaser for the benefit of the respondents. Admitting, however, that the appellant is trustee, still *Lesley's Case*⁵ justifies what the appellant has here done. The effect of *Saunders v. Lord Annesley*⁶ was misapprehended in the Court below, for the result of that very complicated case is not sufficiently stated in the marginal note, on which it is clear that Lord Chancellor Blackburne relied, and the case itself does not apply here, for the *validity of the will has yet to be decided, and the *694

¹ 7 Clark & F. 307, 308.

² 3 Mer. 190.

³ 3 Atk. 26, 2 Brown, P. C. 73.

⁴ 3 Mer. 347.

⁵ 2 Eq. Cas. Ab. 738, Freem. Ch. 52, case 59; but see Mr. Hovenden's note to that case in his edition of Freeman.

⁶ 2 Sch. & L. 73.

title here is not as it was there, that of a mere possessory kind. If the will here is good, George Persse may recover by ejectment against any one holding in opposition to it.

The deeds of January, 1841, constitute a valid transaction of sale and purchase in virtue of legal rights, and cannot be set aside on technical grounds of equity.

The respondents here never carried in a conveyance to the Master's office; they therefore waived their right under the original decree. But suppose they had got a conveyance settled under that decree, it must have recited the death of Parsons Persse, intestate, and without lawful issue (facts still open to contest), and all that Robert Persse, who was then alive, could have conveyed, would have been such interest as he at that time possessed. There would not then have been any trust, and the appellant might, the moment afterwards, have purchased from George Persee, and thus have got a superior title, and one wholly independent of the outstanding title of the respondent.

The decree here is defective in form as well as substance. It has carried the supposed effect of the deed of 1827 much further than the deed itself warrants. It is defective on that account. It is also defective for not giving to the appellant, even supposing him to be a trustee, any compensation in respect of any claims he may have upon the property which he is now required absolutely to surrender.

THE LORD CHANCELLOR. — Mr. Solicitor-General, there is only one point to which I wish to direct your attention. I think the great bulk of the argument may be disposed of very easily. The decree in the original suit, affirmed in this House, and subsequently carried out by the decree of the Court of Chancery in Ireland, says: "That the plaintiffs *be and they *695 are hereby declared entitled to the benefit of the said indenture of the 8th day of December, 1827, in the pleadings mentioned, and the covenants and agreements therein contained." I advert to that for the purpose of showing that according to the opinion of this House afterwards acted upon by the Court of Chancery in Ireland, there was an interest in the children, besides that of the eldest son of Dudley.¹ I allude to that for the

¹ The supplemental, like the original bill, had been filed in the names of Dudley Persse, of his second wife, and of the children of both his marriages. On the

*696 *purpose of showing that there is nothing in the argument as to the eldest son. I do not think I am at all called upon to invite the attention of the House to consider what the ground might have been on which that conclusion was arrived at, but I think I see on the surface of it, dealing with the matter in

hearing before Lord Chancellor Blackburne an objection was taken for misjoinder of parties, founded on the particular words of the settlement of November, 1826. The following is an extract from the report, p. 201 :—

“*Serjeant Christian* for R. H. Persse objected that there was a misjoinder of plaintiffs, for that the children of the second marriage of Dudley Persse, who were joined as coplaintiffs, had no interest in the lands which were the subject of the suit. By the limitations of the settlement executed on the first marriage of Dudley Persse (which limitations also regulated the Castleboy estate), the estate was limited to the first son of the marriage ‘and the heirs male of such son lawfully issuing’; there were no words of procreation, as ‘body,’ &c., and this limitation gave to the eldest son of the first marriage an estate in fee simple, Lit. § 31, *Abraham v. Twigg*, Cro. Eliz. 478. Dudley Persse had therefore no reversion which could be the subject of the second settlement, and the bill must be dismissed. *Richardson v. Nixon*, 2 Jo. & Lat. 250, S. C. 6 Ir. Eq. Rep. 335; *Padwick v. Platt*, 11 Beav. 503; *Fulham v. M’Carthy*, 1 H. L. Cas. 703.

“*Mr. Martley* for the plaintiff.—Although to make the limitation that of an estate tail, there must be some words in the limitation to show of whose body the issue is to be, yet it is not necessary that the word ‘body’ should be contained in the limitation, and the intention of the parties to create an estate tail will be looked to: *Beresford’s Case*, 7 Rep. 135; *Shelley v. Lady Earsfield*, 1 Ch. Rep. 110. But even if this was not so, this bill is filed merely to carry out a decree of this Court, founded upon an order of the House of Lords, which declares that Dudley Persse and the issue of both his marriages are entitled to have this covenant specifically executed. There were children of the second marriage who were coplaintiffs in the original suit.

“THE LORD CHANCELLOR.—Without expressing any opinion on the point of misjoinder which has been stated by *Serjeant Christian*, I am of opinion that I am bound to hear this case upon the record as at present framed. The children of Dudley Persse by the second marriage were coplaintiffs in the original bill, with their father and the issue of the first marriage. No objection to the record on that ground appears to have been made, and they were continued in their position as appellants upon the appeal: no objection appears to have been taken in the House of Lords of the kind now stated; and the Lords’ order declares that the issue of the second marriage, as well as the other appellants, were entitled to a specific execution of the covenant which was the subject of the appeal. The present suit is merely in aid of it, and to facilitate the execution of the original decree pronounced in pursuance of that order, and I must therefore consider that this question is closed by the previous proceedings and the House of Lords’ order, and I overrule the objection.”

This point was mentioned but was not pressed in the argument at the bar of this House on the present occasion.

equity, one or two matters that might have occasioned it. In the first place, it may well be that the Court below was warranted in thinking that that was a mere lapse in framing the settlement. That is with regard to the original settlement of the Roxborough estate ; but further, with regard to the Castleboy estate, the Court may have thought that that might be dealt with just as if there had been no Roxborough estate. An agreement was made to settle the estate on the marriage. Then it might be said that though the expression is "heirs male," that must have meant "heirs male of the body." I think that either of those reasons may be thought a very good ground for coming to the conclusion at which the Court below arrived in conformity with the decision of this * House. That, therefore, disposes of the * 697 question of the improper joinder of the plaintiffs here, because if it is right to have these persons as parties in the original suit, it cannot be wrong to have the same persons as parties in the supplemental suit, and as to those other parties, they stood exactly in the same category. That is an objection of form which I thought it right to advert to.

Now with regard to the question of substance, what the decree does is this: The decree complained of in the supplemental suit first declares that these deeds of 1830 and of 1841 are fraudulent and void as far as they interfere with the deed of the 8th of December, 1827, and it is ordered that the defendants should execute a proper deed of conveyance in pursuance of the covenants in the deed of December, 1827. With regard to that part of the case, what has been done by the decree in the original suit was to declare that the plaintiffs were entitled to have that conveyance as against Robert and this appellant, in one of whom the legal estate was vested. What has since been done is this. The whole legal estate, at the time of that decree, was not in the appellant, but by the deed of 1840 was intended to be so, for the life estate of Robert was conveyed to the appellant, and he afterwards dealt with that estate by conveying an absolute interest in it to George, the natural son of Parsons Persse, in consideration of certain rights which were given up to him by George, and both acted on the assumption that there had been a will and not an intestacy. Now the original decree having directed Robert and the appellant to convey pursuant to the covenants of the deed of 1827, and Robert having subsequently died, and all his interest having passed to the

appellant, the question is what were the rights of the parties when Robert died? I think it is perfectly clear that the appellant, or those who claim under him, had no right to embarrass the

* 698 *cestui que trusts* by setting up a seisin * different from that on which they had accepted the trusts in question, and when the conveyance was originally made by the deed of 1830, that conveyance began by reciting, that in the year 1830, Robert Persse was seised in fee simple in possession, and to that deed Robert and the appellant were parties. That statement of title must have been on the assumption that there was an intestacy, therefore Robert and the appellant are estopped (as between them and for those for whom they were trustees under the deed of 1827) from saying that Robert was not at that time seised in fee, and, in like manner, both the appellant and George are now estopped from disputing that the estate of Robert had passed to the appellant. What the appellant does is, he first embarrasses that by conveying away a portion to George. The result of that is clear, that George becomes a trustee for those for whom the appellant had been a trustee. They were therefore properly made parties to the bill against the appellant (whose uncle and father are now dead) and George, in order to obtain from the two what they could not obtain from the appellant alone, and it was therefore right to declare that the deeds were void as against those parties in whose favour the deed of 1827 was executed, and in ordering the appellant and George to convey according to that deed.

The only point on which I should wish to hear the Solicitor-General is this, whether the decree has been sufficiently guarded in not securing to Robert Henry any rights, if there are any, which he may have by virtue of this will, because, suppose instead of having taken a conveyance from George, he had merely taken a contract, and the conveyance had been executed afterwards according to that contract, if George was to bring an ejectment, and it is contended on the part of the appellant that there is nothing to prevent him doing so, the question would be

* 699 * whether the terms of this decree would prevent him from asserting that right which, but for the terms of the decree, he might assert. All I wish to hear the Solicitor-General upon is, whether or not any provision should have been introduced into this decree saving to the appellant a right to assert any title which he might have under this will by ejectment or otherwise.

The Solicitor-General, Sir R. Bethell (*Mr. Giffard* appeared with him), for the respondents. — The transaction on the part of the appellant was fraudulent, and therefore he acquires by it no title whatever. The appellant gave no consideration for what he received from George Persse, except the assurance made by virtue of that title derived from Robert Persse, which Robert held as trustee for the respondent. That was a fraud; and the gift thus fraudulently made has been restored by the decree now under appeal. The same equity applies both against George and the appellant. If that is so, then this fraudulent contract cannot be founded on so as to require any provision to be introduced into the decree to protect either of these two persons, who have thus entered into the fraudulent agreement. Another answer to the question now put may be found in the deeds of 1841. In these two conveyances, the appellant is treated as the only person who had any legal title to convey, and yet George, who according to assumption now put forward, ought to have been the person first to convey, takes from the other an adverse title, and accepts from him an assurance in fee of part of the estate, and a term of years of the rest. If there was any thing which was required to be introduced into the decree, it would be on the ground that some title existed in the devisee. But the only individual who could put forward a claim to that would be George Persse.

* Now the appellant has taken nothing from him but the * 700 release of a right. The respondent has a claim to that, for he is entitled to the benefit of all dealings by his trustee with his estate. The meaning of the decree is, that George Persse has taken from the appellant a fraudulent conveyance of that which was in the appellant, but only in him as trustee. The argument for the appellant admits, and indeed asserts, that George did not convey the land, but only his right, title, and interest. When a man is out of possession, he must convey in that form, he cannot do more: he cannot pretend to make a conveyance of the estate itself, for possession is necessary for that purpose. The allegation of fraud being sustained in the original case, this decree might have set aside the subsequent release. The decree might have declared that, under the circumstances, parties entitled to the benefit of the release executed by George Persse, might retain it, but that the respondents were entitled to have it set aside as fraudulently made as to them, and to have restitution of that

part, but that George Persse himself could not be relieved from the effect of that release, but was bound by the consequences of his own fraudulent act. On these considerations, the House must, it is submitted, come to the conclusion that George Persse is not entitled to any protection at all, and that the decree declaring the rights of Dudley Persse against the acts of the appellant and of George Persse must be supported.

The decree has given effect to the plain intention of the order of this House. The expressions used in giving judgment in this House are explained and justified by the argument at that time. It was said that Robert Persse, the father, was not duly protected by not having leasing powers, and by not having protection against impeachment for waste, and it was with reference to these *701 matters, and * to them alone, that the observations which have been referred to were made.

Mr. Selwyn, in reply. — There was no fraud in entering into these deeds. They constituted a fair and prudent settlement of conflicting claims. The appellant had a clear right to purchase what George conveyed to him. That was a conveyance of something independent of the deed of 1827. Not being a fraudulent purchase during the continuance of the life estate, it did not become so afterwards. The respondent cannot be allowed to impeach this purchase without being called on to pay compensation for the interest obtained under it. The only question in equity is, whether there has been a valuable consideration for the purchase. There has been such a consideration here. If the appellant is a trustee at all, he is only so for the life estate, but that did not affect his right to purchase a different and an adverse interest, and the conveyance now ordered to be made should be so guarded as to leave the appellant the full benefits of the interest so purchased.

THE LORD CHANCELLOR. — What I propose to do is, more at leisure to look into the case and have it put into the paper again on some early day. If it should turn out on reconsideration of this matter that I did not put before the Solicitor-General all the points on which I should wish to hear him argue, the case shall be heard fully out, and we will treat what has been done during the last half-hour as having been merely a matter of desultory discussion. If I should think it did turn on that point, it has been fully

discussed, and I shall be prepared to move the judgment of the House.

* THE LORD CHANCELLOR, having fully stated the facts of * 702 the case, said. — Of course, my Lords, I need not now declare that the deed of June, 1830, was an attempt to do what it was beyond the power of Robert Persse, the father, to do, if that previous agreement of December, 1827, was valid. If he had by a valid and binding contract agreed that, subject to his own life interest, the property at his death should go in the same way as the Roxborough estate, he could not afterwards alter that by saying that it should go in a different manner, namely, to his second son. The Court of Chancery in Ireland having made a decree on this matter, that decree was brought by appeal to this House, and your Lordships directed the earlier deed to be carried into effect by a conveyance, a direction of which the Court of Chancery was to look to the execution. The other deeds, of which your Lordships have heard, were then executed, and their validity to prevent the performance of the previous direction of this House, and of the consequent order of the Court of Chancery, is now the question to be considered.

So long as Robert, the father, lived there was no interest in possession in Dudley Persse, or any of those who claimed under the settlement. It is not therefore a matter of surprise that no steps were taken by the respondents during the life of Robert Persse. But when Robert Persse died, in 1850, then arose a question, who was entitled to this estate? because there would be no doubt, according to the deed of 1827, and the decree finally established by the order of your Lordships' House, that when Robert Persse's life estate was out of the case, the estate would go to Dudley Persse, and to those who claimed under him; and then it would be a matter of course for the parties to apply for and get a conveyance. But it appears that intermediately between * the decree that was pronounced by the order of * 703 your Lordships' House, and the death, ten years afterwards, of Robert Persse, new legal interests had been created, new legal interests, at all events, in the Castleboy estate. For the property having been conveyed in 1830, so that the legal and beneficial estate was in Robert during his life, and the legal interest (but, according to the decision of the House, only the legal interest) in

the reversion after the death of Robert had been conveyed to R. Henry, the appellant, it appears that by a deed dated the 28th of May, 1840, which is exactly three weeks after the order of your Lordships' House, Robert conveyed his life interest, indeed his whole interest (he having nothing but his life interest to convey), to his son, the appellant, in fee, in consideration of an annuity secured to him. The result of that was, that by that conveyance made by Robert, the appellant became the owner of the legal fee. If that had been all it would have made no difference, because the legal fee had already been vested in the appellant by the transaction of 1830. When, therefore, Robert, the father, died, that conveyance would have no effect. It was only a conveyance which operated on his life estate, and, of course, his death would terminate it.

But it appears that that was not the only dealing with the property. It seems that after the pronouncing of this decree, it was discovered, or at some previous time it had been suggested, if not discovered, that it was wrong to speak of the lunatic, Parsons Persse, as dying intestate; for that, in truth, he had made a will prior to his lunacy, and which was made, as it was suggested, when he was of competent mind to make a will. As to the truth of that statement it is not necessary now to speculate. The parties chose to treat that as, at all events, a possible state of things; and in

January, 1841, eight months after the conveyance which *704 had been made by Robert of his life * interest to his son, the appellant, the son, having thus got the entire legal fee, entered into a contract with the persons who were entitled, or claimed to be entitled, to the whole interest, legal and beneficial, under this alleged prior will of the lunatic; and what they did was this: the appellant said, "If the will is valid, and you are entitled under it, you will have the whole estate; if you are not entitled, then I have the whole legal fee in me. Now, I will immediately give you up a portion of the property, of the value of 320*l.* a year, or thereabouts, and in consideration of my doing that, you shall agree that, whatever be your right and interest under the prior will (if there was a prior will), you will convey that to me; and further, I will not only convey to you a portion of the estate, but I will convey to you the whole of the estate for the term of a thousand years, to secure to you that which I assert, namely, that what I have conveyed to you, or am to convey to you, in fee, is of the

full value of 320*l.* a year." That arrangement was carried into effect, or was intended to be carried into effect, by two deeds, both dated the 2d of January, 1841, by the one of which the appellant conveyed a portion of the Castleboy estate in question to George, who was the natural son, and the devisee under the alleged will ; and he also, for a term of years, secured the value of that which he had so conveyed. On the other hand, George released to the appellant all his right and title, such as it was, under this alleged will.

Now, it is quite obvious that the result of that was, that the legal estate had been put out of the appellant into George absolutely as to a portion of it, and for a term of one thousand years as to the whole. The right of the respondent Dudley, under the decree of the Court of Chancery, made in pursuance of the order of your Lordships' House, was to have the fee conveyed to him as soon as the death of his father had removed that life estate out of * the * 705 way. It was a matter of course, therefore, that the person who held the fee (which he, under the order of your Lordships' House, and the subsequent decree, was bound to convey), having encumbered that fee by creating interests, the other parties, those to whom he conveyed, must be subject to the same right as existed against the appellant himself, to convey the property pursuant to the decree that had been directed by your Lordships' House. Consequently it became a matter of obvious necessity and obvious right to file a supplemental bill against those new parties who had thus caused the estates to be encumbered in a manner embarrassing to persons whose title had been declared by the former order of the House and the subsequent decree. It was a matter of course, therefore, to file a supplemental bill against the former parties, and against George, who had taken this new interest. That bill was accordingly filed, and a decree was made, giving relief exactly in conformity to what had been done before, namely, declaring that Dudley Persse, and those claiming under him, were entitled as against R. Henry, and as against George, who claimed under him, to have a conveyance made in pursuance of what had been formerly declared to be their rights.

But the appellant sets up this objection, that since that decree in 1840, he has obtained by conveyance or release from George a new and different interest from that which was intended to be affected by the decree, and was alone affected by the decree, pro-

nounced in 1840 in your Lordships' House. I have considered this case attentively, and I have finally come to the conclusion that that suggestion is one that cannot be adopted. The appellant was bound by the former decree, and continues bound by the former decree, to convey the fee simple. It is no answer to those who insist upon the rights declared in their favour by that *706 *decree, and the deed which was the foundation of it, to say: "Well, but since that decree was made I have chosen to take a conveyance or release" (or whatever name is to be given to it) "of some other interests than that which the decree was meant to affect." The answer to that is: "Obey the decree, convey the fee simple in the mode in which the decree has made it your duty to convey it, and then you may set up any other rights that you can get. If you have chosen so to take a conveyance or release as to make it impossible to convey the property without parting with some other interest which the decree was not meant to affect, that is a matter with which these parties in this supplemental suit have nothing to do. They were declared entitled by the former decree to have a conveyance from you of that fee simple upon certain trusts and uses, and that conveyance you are bound to execute." That was the view taken by Lord Chancellor Blackburne, and, in my opinion, it was taken with perfect correctness.

In the course of the argument (ante, p. 695), I intimated an opinion that there was nothing whatever in the objection that there were here one or more plaintiffs who had no interest. I do not think that is at all material, because whether or not that is the case *per incuriam*, or otherwise, does not signify. This House declared in the former decree, that Dudley Persse, and all his children, namely, the eldest son and his two daughters by the first marriage, and the children by the second marriage, were entitled to the benefit of that conveyance. In my opinion that was perfectly right, because although it may be true according to the strict legal construction of the Roxborough settlement, that there was no reversion properly so called, the contract to settle the estate was a contract executory in its nature, and very likely the Court thought it was totally unimportant whether it created *707 an estate tail or not. It was perfectly *manifest that it was the intention that it should create an estate tail. That gets rid of that minor difficulty. It appears to me therefore that

the Court below took a perfectly correct view of the case, and consequently that this appeal is utterly without foundation.

Decree affirmed, and appeal dismissed, with costs.

Lords' Journals, 9th June, 1856.

BUSH v. FOX.

1856. June 24.

WILLIAM BUSH, *Plaintiff in error.*

SIR CHARLES FOX, Knight, and others, *Defendants in error.*¹

Patent. Misdirection.

In an action for an alleged infringement of a patent where the defence is that the supposed invention is not new, the Judge may compare the plaintiff's specification with the specification of a previous patent, and may on such comparison direct the jury to find a verdict.²

B. took out a patent which he described as relating to "means and apparatus for working under water in order to produce excavations and building foundations of lighthouses, piers, jetties, and other structures under water." There had been a previous patent taken out by another person, for "An apparatus to facilitate excavating, sinking, and mining." On comparing the two patents, the Judge at the trial was of opinion that both claimed substantially the same invention. The evidence showed some difference in the mode of working, but the witnesses said that both patents had substantially the same object. The Judge thereon directed a verdict to be found for the defendant :³

Held that the direction was right.

THIS was an action brought in the Court of Exchequer for the infringement of a patent, dated 21st September, 1841, and granted for the invention of "improvements in the means of, and in the apparatus for, building and working * under water. * 708 The defendants having cravedoyer of the letters patent, pleaded, 1. That the Queen did not give or grant to the plaintiff such licence as is in the declaration mentioned in manner and form, &c. 2. That he was not the true inventor. 3. That the sup-

¹ *Betts v. Menzies*, 10 H. L. Cas. 125 ; *Harwood v. Great Northern R. Co.*, 11 H. L. Cas. 663 ; *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 694.

² *Mersey Docks Trustees v. Gibbs*, Law Rep. 1 H. L. 98.

³ *Simpson v. Holliday*, Law Rep. 1 H. L. 318.

posed invention in the declaration mentioned was not an invention of a certain manner of new manufacture in manner and form, &c. 4. That the invention was not new. 5. That the plaintiff did not particularly describe and ascertain the nature of it, and in what manner it was to be performed. 6. That the specification was not enrolled. And, 7. Not guilty.

The invention was described in the introductory part of the specification as follows: "My invention relates to means and apparatus for working under water, in order to produce excavations, and building foundations of lighthouses, piers, jetties, and other structures under water."

The specification described the invention by reference to drawings, and concluded as follows: "Having thus described the nature of my invention, and the manner of performing the same, I would have it understood that I do not confine myself to the precise details shown, provided the peculiar character of my invention be retained, but what I claim is the mode of constructing the interior of a caisson, in such manner that the workpeople may be supplied with compressed air, and be able to raise the materials excavated, and to make or construct foundations and buildings as above described.

At the trial before the Lord Chief Baron at the sittings after Michaelmas term, 1852, the letters patent and specification having been put in and read, the plaintiff in error was called and examined as a witness. He described his invention to consist in a particular mode of building foundations and structures under water, and in the use and adaptation of a caisson and apparatus *709 for that purpose *such caisson becoming part of the foundation or other permanent structure.

In the course of the cross examination of the plaintiff in error, the defendants put in evidence, and read the specification of letters patent granted to Lord Cochrane, on the 20th of October, 1830, for "apparatus to facilitate excavating, sinking, and mining."

The invention was described in the introductory part as follows: "My invention consists in an apparatus (hereinafter described) for compressing atmospheric air (into and retaining the air so compressed) within the interior capacity of subterranean excavations, sinkings, or mines, or within those portions of that capacity where the operations of excavating, sinking, and mining are going on, in order that the additional elasticity given to (and maintained

in) the included air by aid of my apparatus, over and above the ordinary and natural elasticity of the atmospheric air which is contained in excavations and mines, may counteract (in part or wholly) the tendency of superincumbent water (or of such superincumbent earth as is rendered semi-fluid by admixture with water) to flow, by gravitation, into such excavations which (as aforesaid) are filled with compressed air, and maintained full of compressed air, by aid of my said apparatus, and which apparatus, at the same time that it is adapted to retain the said included air in a state of compression, in order to prevent or diminish the influx of water, or of semi-fluid earth, is also adapted to allow workmen to carry on their ordinary operations of excavating, sinking, and mining, by working under ground within the space which is filled with compressed air, and also to allow workmen ready passage to and from the said space into the open air, or to and from the said space into those parts of the subterranean excavations or mines which contain air in a natural and ordinary state of elasticity."

* The plaintiff asserted the object of Lord Cochrane's *710 invention to be different from his own, inasmuch as Lord Cochrane's was for working on land, and his own for working under water, but he admitted that the mode was similar in respect of the use of compressed air.

James Campbell, an engineer, called on the part of the plaintiff, stated the plaintiff's invention to be a new mode of constructing foundations under water; that the invention was new as applied to water, but that in the case of the Goodwin Sands, in which there are eighteen feet of water above the sand, when men have got down through the water, and are working in the sand, the operation, so far as working in the sand is concerned, would be the same, whether they were working by Lord Cochrane's or by the plaintiff's invention.

At the conclusion of the examination of this witness, the Lord Chief Baron interposed, and directed the jurors that if they believed the above evidence, the invention was not an invention of any manner of new manufacture, and they must find a verdict for the defendants upon the third plea, and the jury found a verdict for the defendants accordingly. On a bill of exceptions the Court of Exchequer Chamber sustained the direction and the finding of the jury.¹

¹ 9 Exch. 651.

In February, 1854, proceedings by way of suggestion and denial of error, were taken by the plaintiff, according to the provisions of the Common Law Procedure Act of 1852, and the record was brought up to this House.

The Judges were summoned, and Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Creswell, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, and Mr. Justice Crowder attended.

* 711 * *Mr. Webster* for the plaintiff in error. — The direction was wrong, and there ought to be a *venire de novo*. The whole matter was treated as a matter of law, and even assuming what was done to be new, the direction declared that the invention was not a new manufacture. In this manner the whole case was taken from the consideration of the jury, and was decided by the Judge. That was erroneous. Again, when the case was argued in the Exchequer Chamber, the Judges refrained from giving any opinion on the question of the invention being a new manufacture, and confined themselves to the point of novelty. The judgment of the Court does not therefore sustain the direction at *Nisi Prius*.

The question of novelty is entirely one for decision by a jury. That involves the question, what is the real invention, and that is a question of fact. There is one plain and substantive difference between the invention of the plaintiff and that of Lord Cochrane, or any other person, namely, that the plaintiff's caisson or cylinder became part, and was left as part, of the permanent structure. This is a very important portion of the invention. That invention was rightly described as an improvement in the means of, and in the apparatus for, working under water. The external structure was well known, but the internal structure, which was the subject of the plaintiff's patent, was new. The mode of doing the work was different, for the man entered at the top instead of entering at the bottom, and so worked differently. The caisson itself was not claimed as a part of the plaintiff's invention, and the novelty was not in the result obtained, but in the mode of obtaining it. The spirit in which the Court of Exchequer dealt with patents in *Morgan v. Seaward*¹ has never been approved by the profession, and that case ought not to form a precedent * for the present, but that of *Cutler*² ought rather to be adopted.

¹ 2 M. & W. 544.

² *Webst. Pat. Cas.* 418, 427.

The case of *Neilson v. Harford*,¹ where it was said that the construction of the specification of a patent belongs to the Court and not to the jury, does not apply here, for this was not a question of construction, but of novelty; and even there it is said² that the power of the Court to construe instruments arises only "as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury." The direction here disregarded that restriction. Where there is a claim made in respect of a combination of different things, the validity of the patent depends on the question whether that which is claimed in the specification, as a whole, is new: *Newton v. The Grand Junction Railway Company*,³ *Haworth v. Hardecastle*.⁴ To select a particular part which is not claimed, as was done here, is wrong. Where the specification does not distinguish what is new, the patent is of course bad: *Macfarlane v. Price*,⁵ and *Tetley v. Easton*.⁶ But that is not the case here; and *Walton v. Potter*⁷ shows that where a part is new and useful, there may be an infringement of the patent by the unauthorised use of that part. That case must govern the present.

Mr. Hindmarch, who appeared for the defendants in error, was not called on.

THE LORD CHANCELLOR. — My Lords, I think it will not be necessary to trouble your Lordships to hear any thing in observation from the learned counsel for the defendants in error. The question *arises upon the validity of a certain bill of *713 exceptions to the ruling of the Lord Chief Baron at the trial for the infringement of a patent, a patent of considerable importance; and the question is, whether or not the direction given by the Lord Chief Baron was right in point of law. If it was, there is an end of the case. Now, what I would propose to do before calling upon the learned counsel for the defendants in error to address the House, is to put to the learned Judges simply this question, Whether, looking at this record, the direction given by the

¹ 8 M. & W. 806.

² 8 M. & W. 823.

³ 5 Exch. 331.

⁴ 1 Bing. N. C. 182, 4 Moore & S. 720.

⁵ 1 Stark. 199. See also *Campion v. Benyon*, 3 Brod. & B. 5.

⁶ 2 Ellis & B. 956.

⁷ Webst. Pat. Cas. 585.

Lord Chief Baron was a correct direction in point of law? Of course, if it should turn out that the learned Judges are not clear that the direction of the Lord Chief Baron was right in point of law, the argument must be resumed, and then we shall be ready to hear the learned counsel for the defendant in error.

The question proposed was put to the Judges, who retired for a short time. On their return,

MR. BARON ALDERSON said: My Lords, her Majesty's Judges are unanimously of opinion that the direction of the Lord Chief Baron was right. The third plea, that this was not a new manufacture, clearly involves both the question of its novelty, and of its being a manufacture. The invention which is here claimed is thus described. [His Lordship read the description and claim in the specification. See ante, p. 708.] It is to be observed, that he does not claim the foundations thus laid, but the mode of being enabled to make them. The invention claimed, therefore, is such a special apparatus applied to the interior of a caisson as may enable the workmen to descend into and ascend from a * 714 chamber filled with air in a compressed * state, where they may work in the construction of the foundations in a space previously excavated, and into which the compressed air, whilst it enables them to breathe and work, prevents the external water from coming to interrupt their labours. The apparatus also permits them to communicate with the surface, and to carry in their materials and tools, and to carry out the materials excavated. We think this is precisely what was done by Lord Cochrane's invention, and the evidence of the plaintiff's witness, James Campbell, clearly agrees with that view, and confirms us in that conclusion. If so, the Lord Chief Baron's direction was right, that this really was no new manufacture, and that therefore the patent cannot be supported.

THE LORD CHANCELLOR.—My Lords, from the time that I understood, from the argument at your Lordships' bar, what the facts of this case were, I really have entertained no doubt whatever upon the question now before your Lordships, namely, whether or not the direction of the Lord Chief Baron was right. I am not, indeed, clear that the Lord Chief Baron might not have

gone much further, and that, even if there had not been any evidence at all, he might not have directed the jury to find for the defendant; because I think it was for the Court to compare the two specifications together, and comparing the two together, it appears to me perfectly clear that the material part of the plaintiff's invention was involved in the invention of Lord Cochrane. It may be the fact that the plaintiff had discovered something for which he might have obtained a patent, and for which, if it is not too late, perhaps even now, by disclaiming a part of that which he has claimed as his invention, he may still have rights as to something that is valuable. *That is a matter upon which *715 I need not speculate. But the plaintiff's invention consists of this (putting it in popular language): a plan, by means of a caisson, for introducing by successive chambers compressed air, so that persons may, by the mode which he points out, make the foundations of buildings which are to be constructed under water, eventually to sustain lighthouses and other buildings above water. And to do that in the mode which he has pointed out, one material part of the invention, as he claims it, is the formation of successive chambers, whereby the parties working will be supplied with compressed air.

Now, unfortunately, he has claimed that as part of his invention. The learned Judges have pointed out that to be so, both in the terms in which he introduces his specification, and the terms in which he concludes it. "My invention," he says, "relates to means and apparatus for working under water, in order to produce excavations," — "means and apparatus for working under water"; that is, successive chambers, whereby, by a very ingenious contrivance, the parties working are to be supplied with air. Then he says: "What I claim is the mode of constructing the interior of a caisson in such manner that the workpeople may be supplied with compressed air, and be able to raise the materials excavated, and to make or construct foundations and buildings, as above described." Now, my Lords, Lord Cochrane having invented a caisson which has substantially the same object and the same operation, namely, to enable parties at great depths to be supplied with compressed air, it appears to me, independently of any testimony, that the two are substantially the same. And in confirmation of that, two gentlemen who were called as witnesses, or rather the plaintiff himself, and a witness, say that, sub-

stantially, so far as that went, it is the same thing: one
 * 716 was for working under ground and * the other for working
 under water, but both had substantially the same object.
 That evidence being given the Lord Chief Baron says: if the jury
 believed that evidence, the invention was not an invention of any
 manner of new manufacture; it was not new at least in the ma-
 terial part of it, the mode of putting up the caisson, so as to
 supply the workmen with air. My Lords, I entirely concur in the
 opinion which the learned Judges have, without any hesitation,
 given to the House, that that direction of the Lord Chief Baron
 was perfectly right, and consequently that there is no foundation
 for this proceeding in error.

Judgment given for the defendant in error, with costs.

Lords' Journals, 24th June, 1856.

IN COMMITTEE FOR PRIVILEGES.

1856. April 8; May 19; June 30.

THE FERMOY PEERAGE CLAIM.

Act of Union with Ireland. Irish Peerage. Attorney-General.

The word "peerage," in the fifth clause of the fourth article in the Act of Union of Great Britain and Ireland, means the status and condition of a peer, and therefore where one person held many titles, by any one of which he could sit in the Irish House of Peers, so long as any one of those titles remained in him or his descendants the loss of any of the others did not constitute an extinction of a peerage.

A., before the Union with Ireland, was a peer of Ireland, by the title of Earl M. That title had descended to him from an ancestor, to whom it was granted with the usual limitation to the heirs male of his body. Before the Union took effect, A. received a new patent creating him Baron of M., remainder to the heirs male of his body, failing whom to B., and the heirs male of his body: A. died without leaving male heirs of his body, and the Earldom of M. was left without a successor, and the Barony of M. passed to B.:

* 717 * *Held*, that this was not such an extinction of a peerage as was contemplated by the Act of the Union, and consequently could not be taken as one of three extinctions, on the happening of which, the Crown could create a new Irish peerage.

Quære. Whether when the validity of an existing grant of a peerage is questioned, the Attorney-General is bound to appear to support it.

ON the 14th May, 1855, letters patent passed the Great Seal of Ireland, creating Edmund Burke Roche, of Trabolgan, in the county of Cork, Esq., a peer of Ireland, to him and the heirs male of his body, by the name, style, and title of Baron Fermoy, in the county of Cork. On the 11th June, 1855, an order of the House was made, "That the circumstances attending the creation of the barony of Fermoy be referred to the Committee for Privilege, to consider and report." Baron Fermoy presented a petition, praying that his right to vote at the election of peers for Ireland, to sit in the Parliament of the United Kingdom, might be admitted. The petition was referred to the committee.

The committee sat on the 8th April, Lord Redesdale in the chair, and the Judges were summoned. The Lord Chief Baron, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Creswell, Mr. Justice Erle, Mr. Justice Wightman, Mr. Justice Williams, Mr. Justice Crowder, Mr. Justice Willes, and Mr. Baron Bramwell attended.

The letters patent creating the petitioner Baron of Fermoy were produced and read.

A return of "all the peerages of Ireland created since the Union, stating the peerages on the extinction, or supposed extinction, of which each new peerage has been created, and also of all other peerages of Ireland supposed to have become extinct during the same period," was laid before the committee.

The question submitted for the consideration of the committee was, whether there had been an extinction of three *peerages of Ireland before the creation of the Fermoy *718 Barony. There had been undoubtedly two extinctions; the question arose on the earldom of Mountrath. In 1660, Sir Charles Coote, Bart., was created Baron Coote of Castlecuffe, Viscount Coote of Castlecoote, and Earl of Mountrath, with remainder to the heirs male of his body. Charles Henry, the seventh earl, was by patent, dated 31st July, 1800, created Baron Castlecoote, with remainder to the heirs male of his body, and on their failing, with remainder to a distant relative, who on the death of this grantee in 1802 succeeded to that barony, the earldom then becoming extinct.

LORD CAMPBELL said, that he wished to call the attention of the committee to the circumstance that there were counsel attending

to support the patent, and one learned gentleman was in attendance to oppose it; but though notice had been given to the Attorney-General, he was not in attendance. In such a question he thought it was the duty of the Attorney-General to attend the committee. The committee was by statute the proper tribunal to decide whether a person who claimed to vote for representative peers of Ireland was entitled to do so or not. As a grave question had been raised as to the validity of the patent, which was an act of the Crown, and that question had been referred to the committee, the Attorney-General was, in his opinion, bound to attend and give his assistance. Wherever, as here, there was a question as to the exercise of the prerogative of the Crown, it was not merely the right, but the duty of the Attorney-General to appear. This neglect to attend must not be drawn into a precedent.

THE LORD CHANCELLOR. — The absence of the Attorney-General had not been occasioned by any negligence on his part, or by any want of respect for the House. Here a patent was presented, and an individual claimed certain * rights under it, and the question was, what were his rights? The Attorney-General being of opinion that that was a question affecting the patentee, but not the Crown, thought that it would be an indecorum in him to attend. The learned gentleman had fully stated in writing his reasons for this opinion.

LORD CAMPBELL did not understand how a doubt could be entertained on the matter.

THE LORD CHANCELLOR said that the doubt was sincerely and strongly entertained.

Sir F. Theigier and Sir F. Kelly (Mr. A. J. Stephen, Mr. P. Burke, and Mr. H. P. Roche, were with them), for the petitioner. —

This is a question on the construction of the fourth article * 720 of the Act of Union with Ireland.¹ There are * two dis-

¹ By which it is declared "That it shall be lawful for his Majesty, his heirs and successors to create peers of that part of the United Kingdom called Ireland, and to make promotions in the peerage thereof, after the Union, provided that no new creation of any such peers shall take place after the Union until three of the peerages of Ireland, which shall have been existing at the time of the Union, shall have become extinct; and upon such extinction of three peerages, that it shall be lawful for his Majesty, his heirs and successors, to create one peer of that part of the United Kingdom called Ireland; and in like manner, as often

tinct branches in this article. The object of the first is to place a limit on the indefinite extent of the power of the Crown to create Irish peers; the second, is to keep up the number of such peers to one hundred. In arguing this question, the first principle to be remembered is, that the right of the Crown cannot be taken away by implication, but only by direct words. No such words exist here, and the Act of Union being in this respect a restraining statute, must be construed strictly as against the restraint. There is no question with respect to the peerages of Melbourne and Tyrconnell, but only as to that of Mountrath; and the point is, whether as the same individual held the earldom of Mountrath, with the barony of Castlecoote, the latter of which, on his decease, went under the patent of creation to another person (who could not succeed to the earldom), and is still in existence, the Crown cannot treat the extinction of the earldom as an extinction under the Act of Union. It is submitted, that the Crown has clearly the right so to treat it. The peerages are in fact different creations; have different limitations, and are inheritable by different persons. If they are not distinct for the purpose of extinction, they are not so for the purpose of creation or inheritance. That they are distinct for such purposes is clear from a passage in Coke,¹ where it is * said: "In the *721

as three peerages of that part of the United Kingdom called Ireland shall become extinct, it shall be lawful for his Majesty, his heirs and successors, to create one other peer of the said part of the United Kingdom; and if it shall happen that the peers of that part of the United Kingdom called Ireland shall, by extinction of peerages or otherwise, be reduced to the number of one hundred, exclusive of all such peers of that part of the United Kingdom called Ireland, as shall hold any peerage of Great Britain subsisting at the time of the Union, or of the United Kingdom, created since the Union, by which such peers shall be entitled to an hereditary seat in the House of Lords of the United Kingdom, then and in that case it shall and may be lawful for his Majesty, his heirs and successors, to create one peer of that part of the United Kingdom called Ireland, as often as any one of such one hundred peerages shall fail by extinction, or as often as any one peer of that part of the United Kingdom called Ireland shall become entitled, by descent or creation, to an hereditary seat in the House of Lords of the United Kingdom; it being the true intent and meaning of this article, that at all times after the Union it shall and may be lawful for his Majesty, his heirs and successors, to keep up the peerage of that part of the United Kingdom called Ireland to the number of one hundred over and above the number of such of the said peers as shall be entitled, by descent or creation, to an hereditary seat in the House of Lords of the United Kingdom.'

¹ 2 Inst. 594.

mean time this is to be observed, that the greater dignity doth never drown the lesser dignity, but both stand together in one person, and therefore if a knight be created a baron, yet he remaineth a knight still, and if the baron be created an earl, yet the dignity of a baron remaineth, *et sic de cæteris*." The only possible explanation for the difficulty now made is to be found in the loose wording of the Act of Union, where the word "peerage" has in a confused manner been applied to describe both the dignity itself and the body of peers. But a different meaning must be given to it according to the place in which it is found, and in each its ordinary construction must be preserved. That would get rid of all difficulty, and prevent any possible abuse of the power of the Crown. In Cruise on Dignities,¹ it is said, that an opinion formerly prevailed that where a person had a barony by writ, consequently descendible to heirs general, and was created an earl, that that attracted the barony, but that opinion was explained and corrected in the *Grey de Ruthyn Case*,² and in the *Fitzwalter Case* in 1668, where the same point was raised, the Judges said that the barony would descend whether the earldom continued or became extinct. Such peerages are as distinct in themselves, though in possession of the same person, as if they were in possession of different persons. The case of Lord Norbury shows that. In 1797 the wife of Mr. Toler was created Baroness Norwood, with remainder to the heirs male of her body by him. In 1800 her husband was created Baron Norbury, with remainder to the heirs male of his body. She died in 1822, when her title went to

*722 *the eldest son, who thereupon became Baron Norwood.

In 1827 her husband was created Earl of Norbury, with remainder to his second son, and the heirs male of the body of that second son. On the death of the first lord the barony of Norbury went to the eldest son, who was already Baron Norwood, and who afterwards died without issue, but the earldom went to the second son. There were here two distinct peerages, though both were held at one time by one person. The Union Act did not prevent such a result. There is a distinction between the peer

¹ 115.

² Collins, Bar. 195. See p. 248, where it is said: "He sits in Parliament in the capacity of all, though in regard he being but one person can have but one place, and so sits in the place belonging to his earldom, as being the highest."

himself and the peerages which he holds. The argument on the other side confounds them together. The right of the Crown arises not merely as often as three peers shall die, but as often as three peerages shall become extinct, for the death of one peer may occasion the extinction of more than one peerage. There may be less than one hundred peers, and yet more than one hundred peerages, in which case the power to create as on a smaller number than one hundred peerages would not come into existence.

If peerages are not distinct, though created with different limitations, and descendible to different persons, then the object of the Act of Union might easily be defeated, for the Crown might create any number of differently descendible titles in any person, and on his death all the different descents would take effect, and so many different persons would be added to the peerage.

[LORD CAMPBELL. — If one man is a baron, viscount, earl, marquis, duke, with the same limitations, would not they all be one peerage?]

They might be; they would not be so if they were creations with different limitations. There would then be one peer holding so many different peerages, which, at his death, would go to so many different individuals. So complete is the distinction between them that in case of the holder of * all these titles *723 created with different limitations, committing the crime of high treason, those peerages only would be forfeited which were derived through him, while those not so derived would not be affected by his attainder. Here the two peerages of Mountrath and Castlecoote might have gone to different persons, and have been held by each of such persons, with all the rights of peerage attached to them. If so, it is impossible to say that, on one of them ceasing to exist, there was not an extinction of a peerage, such as to give the Crown the title to create a new peer.

Mr. Napier, in opposition. — There was no such extinction here as the Act of Union contemplated, where the word “peerage” is used with respect to persons and not to dignities. The true rule for the construction of statutes is that afforded by reference to the time when, and the circumstances under which, it was passed, and to the exposition which it immediately afterwards received. — *Broome’s Maxims*.¹

¹ 532.

The earldom of Mountrath and the barony of Castlecoote had the same limitations, but in the latter there was a remainder over to a collateral branch of the family. The question here is, what is the meaning of the word "peerage," as found in the Act of Union? That meaning is to be sought on the principle already stated, and but one meaning has hitherto been given to it in practice by Attorney-Generals Saurin, Plunkett, and Joy, who have advisedly considered this very question; and their construction of it has plainly proceeded upon the rule stated in *The King v. Hall*,¹ and more authoritatively declared by Lord Chief Justice Tindal, in an opinion delivered, on behalf of the Judges, to this House, in the *Sussex Peerage Case*.²

The Act of Union is an enabling, not a restraining statute.

*724 * By the fact of the union of the two countries, the power to create peers of Ireland ceased, but this Act anew conferred the power on the Crown restraining its exercise only within certain limits.

Though one man may have two titles, descendible in a different manner, he does not therefore possess two peerages. Every distinct peerage gives a distinct vote; but while he holds the two peerages he has but one vote, and possesses but one peerage. A promotion in the peerage is not a new creation; that is provided for by the Act itself. The return³ made to this House shows that distinction. The cases of the Bloomfield⁴ and of the Oranmore peerage,⁵ show how careful this House has always been to see that the powers granted to the Crown have not been exceeded, and to provide a remedy in cases where that has happened by mistake. *Lord Norbury's Case* is fatal to the other side; for both the baronies of Norwood and Norbury vested in the eldest son, and formed but one peerage.

[THE LORD CHANCELLOR. — Suppose there were four peers, A., B., C., and D.; suppose the last three to die without heirs of their bodies, and all the peerages to vest in A.; and then suppose him to die without heirs, would there be an extinction of one, or of three peerages?]

One only.

¹ 1 B. & C. 136.

² 11 Clark & F. 85, 143.

³ Return of all Peerages in Ireland created since the Union, *vide* No. (105).

⁴ 2 Dow & C. 344.

⁵ 2 H. L. Cas. 911.

Sir F. Theigier, in reply. — That answer shows the difficulty to which the other side is reduced. No reason is given, nor can any be, for that answer; it is a mere arbitrary assertion; but it is absolutely necessary for the support of the argument on the other side, which, without it, could not be for one moment * sustained. The contemporaneous exposition of this particular statute, referred to by the other side, amounts to nothing more than this, that the extinction of the Mountrath peerage was overlooked, not that it was deliberately disregarded. Before the Union there was not in Ireland, any more than in England, any limitation to the power of the Crown to create peers. The Union Act has imposed a limitation on that power, and is therefore a restraining and not an enabling Act. To give the word “peerages” the construction now contended for, is to give it the meaning of “peers,” which cannot be done.

[LORD LYNTHURST. — The word “peerage,” in the second clause, means the persons holding the dignity of a peer: why should it not mean the same in the first clause as the second?]

Because the two clauses have different purposes in view; and the word being used for different purposes, must have different meanings agreeing with those purposes.

THE LORD CHANCELLOR proposed the following question for the consideration of the Judges: —

“In the year 1660, A. B. was created Earl of M. in Ireland, to hold the said dignity to him and the heirs male of his body:

“Before the passing of the Act of Union (39th & 40th Geo. 3, c. 67) the then Earl of M., who was heir male of the body of the said A. B., was created Baron C. of C. in Ireland, to him and the heirs male of his body, with remainder to C. D. and the heirs male of his body:

“In 1802, the said last-named earl died without issue male, and there then was a failure of the issue male of the body of the first earl, and the said C. D. became Baron C. of C. in Ireland:

* “Two peers of Ireland, who were such peers before the * 726 Union, died without issue one year before the year 1855; and thereupon these peerages became extinct:

“Was the extinction of the Earldom of M. in 1802 an extinction of a peerage of Ireland according to the true construction of the

Act of Union; and did such extinction, together with the extinction of the two peerages before the year 1855, entitle the Crown to create a peer of that part of the United Kingdom called Ireland?"

The question was agreed to.

THE LORD CHIEF BARON, in the name of the Judges, requested time to answer the question.

Ordered.

19 May.

MR. BARON BRAMWELL. — In considering your Lordships' question, it is to be carefully borne in mind, that according to the terms of the two creations of the earldom of M. and the barony of C., there might, on the death of the Earl of M. in 1802, have been two peers, one a descendant of the first, but not of the last Earl M.; the other C. D., or one of his descendants. I am of opinion that that question should be answered in the affirmative, and that the extinction of the earldom of M. in 1802 was an extinction of a peerage of Ireland, according to the true construction of the Act of Union, and that such extinction, together with the extinction of the two peerages before the year 1855, did entitle the Crown to create a peer of that part of the United Kingdom called Ireland.

There is no doubt that when A. B. was created Earl of M. in 1660, a peerage was created. There is also no doubt that that peerage is extinct. No date can be assigned at which it became so, except that of the death * of the last Earl of M. in 1802, at which time, indeed, your Lordships' question assumes that the earldom became extinct.

The peerage, then, created in 1660, became extinct in 1802. Now, the limitation in the Act of Union on the power to create peers is in these words: "Provided that no new creation of any such peers shall take place after the Union until three of the peerages of Ireland, which shall have been existing at the time of the Union, shall have become extinct." It is on the meaning of those words that the question turns; and reading them by themselves in their natural and ordinary meaning, the case put is within them, for in 1802 the peerage of M. did become extinct.

But it is said that words are not always to be treated as used in their natural and full meaning; that the meaning intended may be shown to be different by a variety of considerations, as that the

natural meaning of any sentence would be inconsistent with the general intent of the document of which it formed part; that it would lead to some great inconvenience; that the context shows that a different meaning must be given, and that authority is the other way. And it is contended that such considerations, when applied in this case, will put a different meaning on the words in question to that which they naturally bear.

I agree that that may be so, but the burthen of proof is on those who affirm. No justification is necessary for a construction which gives words their natural meaning and effect. It is for those who would give another, to justify the rejection of the first and the adoption of that other, the substitution of speculation for construction, for which, I think, most cogent reasons are required in any case.

Now the construction contended for in this case, by those who reject the natural meaning of the words is, that * the * 728 words "three of the peerages of Ireland shall have become extinct," are to be read thus: "Three of the peerages of Ireland shall have become extinct, and under such circumstances that the number of voters or number of peers is diminished by three." That might have been a very proper provision. But the words are not there. However, I admit it may be that the statute should be so construed, and proceed to consider the reasons given for that and against the natural construction.

Now it is said that what I call the natural construction of the words in question is inconsistent with the general object of the Act, which requires the construction contended for. That object seems to have been to preserve an Irish peerage, to reduce it to one hundred votes, not as quickly as possible, but only at the rate of two out of three extinctions, and to provide that the Crown might create one peerage on every three extinctions, with the object, no doubt, of reconciling to the measure some who might expect to be made peers, and would have been unwilling to wait till the numbers were reduced below one hundred; and also with the object of preserving to the Crown a patronage necessary for its due influence, and to enable it to reward deserving persons. I see no other objects, and it seems to me as consistent with them to hold that the Legislature meant what it has said, as to hold that it meant it with the qualification contended for. For, as the reduction to one hundred is not to be as rapid as possible, it may as well

be at the slower as at the quicker rate, which would follow from the adoption of either of the two constructions suggested.

It is argued that if the natural construction is adopted, it might be that on the death of a peer, baron, viscount, earl, marquis, and duke, there would be five extinctions, and so a possible augmentation of numbers instead of a diminution. To this I agree

* 729 if the titles had been granted * with as many different limitations. If on the death of an Irish duke there might be one person duke, another marquis, a third earl, a fourth viscount, and a fifth baron, I agree without any alarm at the consequences. The case probably does not exist, or any thing like it, or nearer like it than the present, which may account for its not having been provided against. And it certainly is wrong to test the meaning of a statute, dealing with an existing state of things, by putting an *à priori* possible case, which, in fact, does not exist. But if the duke with five titles held them all with the same limitations, I do not agree that there would have been an extinction of five peerages. I do not desire to give a precise definition of a peerage, which might be erroneous, and is not necessary; but assuming it to be hereditary (which observation I make because the statute speaks of an "hereditary seat"), it is a thing to be taken in succession by the persons entitled, who have, by the possession of it, a right to sit in the House of Peers, and use a name or names of nobility. It is a thing therefore, a legal entity. If a man is baron and earl, with remainder to the heirs male of his body, there is but one of those things. He has two titles, but only one peerage. There never can be two persons sitting in the House of Peers by virtue of what he possesses. He no more has two peerages than he would have if he were Baron of A. and Baron of B. with the same remainders. And I think this view is strongly confirmed by the expression in the statute, that his Majesty may "create peers, and make promotions in the peerage," showing that to promote a baron to be an earl is not to create a peer, and by the Earl of Norbury's creation, which shows that a promotion in the peerage with a different limitation, is a creation of a peerage within the statute. I do not therefore agree with the objection, nor

* 730 should I think it weighty if I * did, for the reason I have given, viz. that the statute dealing with an existing state of things must be supposed to be providing for probable, not improbable, and, as I believe, non-existing cases.

Then it is said that the context requires the construction contended for, and is opposed to the natural one; and the latter part of the article is relied on. I really am unable to see this argument. The meaning of that part of the article seems clear. "If the number of peers" (which I agree means, not peerages, but persons possessing peerages) shall be reduced below one hundred, then a creation may take place, though ninety-nine peers possess more than ninety-nine peerages.

Then it is said that if that is so, it follows that the word "peerages" (where it is said there may be a creation "as often as any one of such one hundred peerages may fail by extinction") must mean "Peerage failing under such circumstances that there is a voter or peer less." And I agree that it is so, but only because of the previous words, "if the peers shall be reduced to one hundred," and the use of the words "such one hundred peerages." Because, as the word "such" can only refer to the word "peers," therefore the word "peerages," in the phrase, "as often as any one of such one hundred peerages shall fail by extinction," must mean "peers." The sentence is very inaccurate; for not only are the words "peers" and "peerages" used as synonymous, but when the former is substituted for the latter, the sentence read literally is senseless, viz., "as often as any one of such one hundred peers shall fail by extinction." Words must be added, and the entire sentence would be, "if the number of peers shall be reduced to one hundred, then as often as any one of such one hundred shall fail by extinction of peerage." There is also an inaccuracy in the expression "create a peer"; certainly if such creation cannot be for the individual only for his life. Besides, if the word "peerages" is inaccurately used in *one part of the article, is it to be taken to be so in *731 every part? Is there any rule of law or reasoning to that effect?

But is there nothing in the context in favour of the natural, and opposed to the other construction? I think there is. In the first place, it is clear that if there had been an Earl of M., for five minutes after the death of the one who died in 1802; nay (though your Lordship's question assumes the contrary), if it should now appear that there had been a person entitled to that earldom after such death, but now dead, there would be an extinction of that earldom within the statute. Was it meant, then, to regulate and limit the power of the Crown to create peerages,

by the chances of two peerages coalescing in one possessor, and one or both, or neither, surviving him? Again, the section has these words, "where the number of peers is reduced to one hundred, by extinction of peerages or otherwise." That word "otherwise" includes the case of one peerage coalescing with another, tending to show that the union of two is not an extinction of either. Again, in the next clause it is enacted, that if no claim is made to the inheritance of a peerage within a year of the death of the last possessor, it shall be deemed to be extinct. This cannot be read with the addition of "provided the number of peers is thereby diminished." So that there the expression "peerage extinct" is used in its natural sense.

Then it is said, that if the statute means what it seems to me it does mean, it may happen that after the peers are reduced to one hundred, the numbers may be augmented; because a peer with two peerages may die, and a peer is then to be created for each extinct peerage. But this seems to me not so; for, as I have observed, "such peerages" must mean "such peers," that is, such number of one hundred; and the meaning is, as often as there are
 * 732 only one hundred peers, and that * number is reduced one by extinction, there may be a creation. But, even if it were so, it would be no more than may happen on the construction contended for; for suppose the peers had been reduced to one hundred, living the Earl of M., and on his death there had been one person Earl of M., and another Baron Castlecoote, there would have been one hundred and one peers, and as great a cause for creating on the extinction of either, as in the case first supposed.

Next, it is said that contemporaneous exposition and authority have put a different construction on the statute. I doubt exceedingly the application of the doctrine of contemporaneous exposition to the present case. But, assuming it strictly applicable, authority seems more in favour of the construction I contend for than of the other.

Probably it may be taken that it was supposed by those who had to consider the question in 1802, that there was not an extinction of a peerage within the statute on the death of the Earl of M., in 1802. But, on the other hand, it is clear that it was thought that the creation of the Earl of Norbury, with remainder to his second son, he being already Baron Norbury, with remainder (I presume) to his heirs male, was thought a new crea-

tion, because in that case, upon the death of the baron created earl, there might have been two peers, viz., the baron, his eldest son, and the earl, his second son, which is like the case under discussion before your Lordships. None of the other cases bears on the subject, for in none of them was there an extinction, upon one death, of two peerages, with different limitations. In none of the cases referred to in the return will it be found that on the death of any one peer was there an extinction of such a character that there could have been two peers.

The first case with which we are furnished is that of Glendore. "Sir Maurice Crosbie was created Baron * Brandon * 733 by patent dated 16th September, 1758, with remainder to the heirs male of his body. He left three sons, William, John (who left no issue), and Maurice. William Crosbie, the eldest son, was created Viscount Crosbie, of Ardfert, by patent dated 3d November, 1771, and Earl of Glendore, by patent dated 22d July, 1776, with remainder to the heirs male of his body. He left an only son, John, who became second earl, who dying without issue, the earldom and viscounty became extinct, but the barony of Brandon went to the heir male of Maurice Crosbie, third son of first baron. Now, as long as there was a male descendant of William Crosbie, the eldest son, who was created viscount and earl, that male descendant would also have been a baron under the original creation of the barony, and as soon as there ceased to be such male descendant of the man who was created viscount and earl, the brother of that viscount and earl, or a descendant of his, took the barony, and the viscounty and earldom ceased.

The case of Clermont was the next in the return. "William Henry Fortescue, esquire, was created Baron Clermont by patent dated 26th May, 1770, and Viscount Clermont by patent dated 23d July, 1776, with remainder to the heirs male of his body, and in failure of such heirs male, with remainder to the heirs male of the body of his brother, the Right Honorable James Fortescue. He was afterwards (by patent dated 10th February, 1777) created Earl of Clermont, with remainder to the heirs male of his body. He died without issue, 30th September, 1806, when the peerage of the earldom became extinct; but the other peerages of the barony and viscounty went to William Fortescue, the son and heir of his said brother, James Fortescue." A similar observation applies to this case as to the former one, that as long as the earldom con-

tinued in existence, the barony would be in the possession
 * 734 of the earl, * so that there never would be one person sitting
 as a baron, and another as an earl. If the earldom became
 extinct, there might still be a baron who was not a descendant of
 the last earl.

Then the next is the *Cremorne* case. "Thomas Dawson, esquire
 (by patent dated 28th May, 1770), was created Baron Dartrey,
 and (by patent dated 19th June, 1785) was created Viscount
 Cremorne, with remainder to the heirs male of his body. He
 died without issue, 1st March, 1813, when both those peerages be-
 came extinct." It is not necessary to show that there never could
 have been two peerages existing under these two creations.

Now, if creating Baron Norbury an earl, with a new limitation
 (which, as I have mentioned to your Lordships, is the only case
 where there might have been two peers upon the death of one
 peer), was the creation of a new peerage within the Act, so that he
 had two peerages in him, it does seem hard to contend that had
 he died, leaving no successor to either peerage, there would not have
 been an extinction of two peerages within the Act; or that had he
 died, leaving a successor to one peerage only, there would not have
 been an extinction of the other. I suppose it will not be contended
 that the three extinctions then used are still open.

In the result then, however I may distrust the correctness of my
 opinion, on the authority of others, I cannot, notwithstanding all
 the arguments I have heard, as a matter of reasoning entertain any
 doubt on the question.

Mr. Justice Willes. — My Lords, I am of opinion that the extinc-
 tion of the earldom of M. in 1802 was an extinction of a peerage
 of Ireland according to the true construction of the Act of
 * 735 Union, and that such extinction did, together with the * ex-
 tinction of two peerages before the year 1855, entitle the Crown
 to create a peer of that part of the United Kingdom called Ireland.

That the earldom of M. existed at the time of the Union and
 became extinct in 1802 are facts which your Lordships' question
 assumes. And if the barony of C. had never existed, no doubt the
 extinction of the earldom would have been the extinction of a peer-
 age of Ireland, according to the true construction of the Act of Union.

The question, therefore, may be said to turn upon the effect of
 the creation of the barony upon the peerage of the then earl.

The Earl of M., by the original creation of 1660, became a peer of Ireland ; no act of the Crown could make him more or less a peer. If he had been made a duke, that would only have given him superior rank and precedence, but would not have effected his right of peerage. So the grant of a barony to him and the heirs male of his body would have given him merely an additional title of honour, but would not have affected his right of peerage.

Again, if the barony of C. had been granted to the earl and the heirs male of his body merely, then upon the extinction of the earldom in 1802 a peerage of Ireland would have become extinct according to the true construction of the Act of Union. So that the question is further reduced to this, namely, whether the remainder, as it is termed in your Lordships' question, to C. D. and the heirs male of his body, had the effect of preventing such extinction.

I apprehend that it had not such effect. The remainder was no part of the peerage of the Earl of M. So far was it from being a grant of any thing to the Earl of M. and the heirs male of his body, that it was expressed to take only in the event of failure of such heirs. When it * took effect, it did so not by * 736 way of transfer of any right which the earl had to C. D., but by way of a new creation of a distinct peerage in C. D., there being no such thing, properly speaking, as a remainder in a peerage ; that which is called a remainder being in truth a grant of a new peerage, in a certain event, to the person designated to take in default of issue of the first grantee.

The peerage, therefore, which was created in 1660, and not affected by the grant of the barony to the last earl, became extinct in 1802, according to the ordinary and common sense of the words ; and therefore, unless the word " peerage " is used in some peculiar sense in the Act of Union, it became extinct according to the true construction of that statute.

I proceed further to consider the language of the Act, in order to ascertain whether, in construing it, the word should be read in any peculiar sense or according to its ordinary meaning.

The portion of the article of the Act of Union upon which the question turns commences by enacting, that " it shall be lawful for his Majesty, his heirs and successors, to create peers of that part of the United Kingdom called Ireland, and to make promotions in the peerage thereof after the Union, provided that no new creation

of any such peers shall take place after the Union until three of the peerages of Ireland, which shall have been existing at the time of the Union, shall have become extinct, and upon such extinction of three peerages that it shall be lawful for his Majesty, his heirs and successors, to create one peer of that part of the United Kingdom called Ireland; and in like manner so often as three peerages of that part of the United Kingdom called Ireland shall become extinct, it shall be lawful for his Majesty, his heirs and successors, to create one other peer of that part of the United Kingdom."

* 737 * Thus far the article is clear. It gives the Crown unlimited power to make promotions, which it correctly distinguishes from the creation of peers, and it further gives the Crown power to create peers within certain limits, namely, one upon the extinction of three peerages existing at the time of the Union (not upon the number of the peers existing at the time of the Union being reduced by three), and thenceforward in like manner so often as three peerages of Ireland become extinct. The words "existing at the time of the Union," to my mind give the clue to the meaning of the enactment, and show that the number of separate and distinct rights of peerage, and not the number of persons who possessed such rights, was referred to. There is no trace in this part of the article of any other intention; and this is the portion of it upon the construction of which the question immediately hinges. It is complete in itself, and applicable in terms to the present case. I conceive it to be unsound construction to alter its effect by reference to another portion of the article, made to meet a different state of things, and having no direct bearing upon the question.

The next portion of the article upon which the main stress has been laid in the argument against the right of the Crown is as follows: "And if it shall happen that the peers of that part of the United Kingdom called Ireland shall, by extinction of peerages or otherwise, be reduced to the number of one hundred (exclusive of all such peers of that part of the United Kingdom called Ireland as shall hold any peerage of Great Britain subsisting at the time of the Union, or of the United Kingdom created since the Union, by which such peers shall be entitled to an hereditary seat in the House of Lords of the United Kingdom), then and in that case it shall and may be lawful for his Majesty, his heirs and suc-

cessors, to create one peer of that part of * the United * 738 Kingdom called Ireland, as often as any one of such one hundred peerages shall fail by extinction, or as often as any one peer of that part of the United Kingdom called Ireland shall become entitled, by descent or creation, to an hereditary seat in the House of Lords of the United Kingdom, it being the true intent and meaning of this article that at all times after the Union it shall, and may be lawful for his Majesty, his heirs and successors, to keep up the peerage of that part of the United Kingdom called Ireland, to the number of one hundred, over and above the number of such of the said peers as shall be entitled, by descent or creation, to an hereditary seat in the House of Lords of the United Kingdom."

This latter portion of the article was framed to provide for an event which it was supposed might possibly happen, and to give the Crown in that event a distinct additional power of creating peers of Ireland. The language used professes to give another power to the Crown, and does not purport to explain or restrict the power previously conferred. It is to my mind an erroneous construction to attribute to words used for the purpose of granting additional rights the effect of restraining rights already conferred. The rule that words used for the purpose of conferring additional rights ought not to be construed to restrain other rights already existing or conferred by the same instrument, seems peculiarly applicable to the language of a power to be exercised by the Crown *pro bono publico*.

But I am not content with this general argument against cutting down the right conferred upon the Crown in the first member of the paragraph by an indirect inference from the language of the latter part of it, and I proceed to consider that part somewhat more in detail.

It begins with the words "and if it shall happen," which * show that it was only intended to apply in case of an ex- * 739 traordinary exigency, namely, the reduction of the peers of Ireland to one hundred in number. It was, therefore, a distinct and independent enactment made to meet that particular case, and having no necessary bearing upon the construction of the power previously conferred, which was to be exercised in the more probable and ordinary event of three peerages becoming extinct.

The declaration of the true intent and meaning of the article

being to keep up the number of the peerage to one hundred, appears to me to apply only to the power to create new peers in the event of the peerage being reduced below one hundred in number. The words "this article" must be limited in construction to something less than the whole article, of which only two paragraphs relate to this part of the subject, and those words are properly and naturally limited to the power which they follow, and to the subject matter of which they are appropriate. If it was the true intent and meaning of the whole paragraph in which in the printed statute the two powers are contained to keep up the peerage to one hundred, the power to create a new peerage upon the extinction of three might as well have been wholly omitted, and it is *viperina expositio* to construe the paragraph so as to make the first and leading member of it idle and superfluous for the purpose for which alone, according to such construction, the entire paragraph was framed.

Further: assuming it to be true, as contended at the bar, that "peerage" in the second branch of the paragraph means the entire right of one peer, it acquires that meaning there by the use of the word "such" before the words "one hundred peerages"; that word "such" of course modifying the words which follow, by reference to the next antecedent.

* 740 * Lastly, the force of the argument against the Crown consists in this, that the word "peerage" must be considered as intended to bear the same meaning wherever it occurs in the paragraph. This, however, attributes to the framer of it a rigid consistency of expression, altogether negatived by the fact, that according to any construction of the article, the word "peerage" is used in at least two different senses, namely, that of the dignity itself, and that of the collective body of persons who enjoy the dignity.

Two cases may be put as tests of the true construction of the Act.

Suppose, that upon the death of the Earl of M. in 1802, or at any time since, a claim such as is contemplated by the following paragraph of the Act, had been made to the earldom, by an heir male of the body of the first earl, not being an heir male of the body of the last earl, for instance, by a person claiming through a younger son of any of the earls except the last, and that such claim had been established, so that the earldom and the barony would have existed in different persons. In that event, the earl-

dom and the barony would be two distinct peerages. Then, suppose them to have afterwards, and before a new creation of a peerage under the statute, become extinct, would not two peerages of Ireland have become extinct, according to the true construction of the Act of Union? Clearly they would, — and why? Because they were distinct peerages, or rights of peerage, which were existing at the time of the Union, though not then actually enjoyed by different persons.

Next, suppose the case of two peerages existing at the time of the Union, and at that time enjoyed by two different persons, upon whose deaths, after the Union, both peerages descended to one person, upon the death of whom, * before any new * 741 creation of a peerage under the statute, both peerages became extinct; could it be said in such a case that only one peerage “existing at the time of the Union” was extinct, according to the true construction of the Act of Union.

In putting these cases, I have assumed a proposition, as to which I conceive there can be no doubt, that the circumstances under which the first and subsequent creations, depending upon the extinction of three peerages, were intended to be made, are in respect of the character of the extinct peerages the same.

For these reasons, I answer your Lordships’ question in the affirmative.

MR. JUSTICE CROWDER. — My Lords, in order to answer your Lordships’ question, it is necessary to ascertain the meaning of the word “peerage,” as used in the expression “extinction of three peerages” in the fourth article of the Union.

That word, in the passage referred to, is capable of three different meanings; and the real question is, which of those three meanings the Legislature has assigned to it.

First, a peerage may mean any dignity of nobility, as an earldom, a barony, and the like. This is probably its most usual signification in common parlance. And in this sense it appears to be used in the returns made to this House, with which we have been furnished by your Lordships’ directions, and which were certified by Ulster King of Arms of all Ireland. In those returns it will be found, on reference to the Clermont and Cremorne peerages, that each dignity of nobility granted by a separate patent is designated as a peerage. But the learned counsel for the claimant

were unwilling to accept this meaning of the word "peer-
 * 742 age," although, if adopted, it would have served *their
 purpose. For in that view Lord M. had three peerages in
 him, an earldom, a viscounty, and a barony. And upon his death,
 not one only, but two peerages, the earldom and the viscounty, be-
 came extinct. But if that were taken to be the true meaning of
 the word "peerage," this consequence would follow, that, as the
 Crown may make promotions in the Irish peerage without limit,
 the Crown might by a lavish exercise of the right of promoting,
 give itself the power of creating a new peer on the death, without
 a successor, of almost every individual Irish peer; because each
 peer might by promotions be invested with at least three peerages,
 which would all become extinct on his death without a successor.
 This meaning, therefore, of the word "peerage" was abandoned
 in the course of the argument as untenable.

A second meaning of the word "peerage" may be, where two
 or more dignities of nobility are vested in the same peer with
 different lines of succession; so that it is possible they may at a
 future time vest in different persons. In such case it is said, that
 those dignities which have the same line of succession constitute
 only one peerage, and those which have a different line of suc-
 cession constitute another peerage.

In this sense Lord M. had only two peerages in him, viz., the
 earldom and viscounty, descending similarly, and counting as one
 peerage; the barony descending differently and counting as the
 other. And on his death one peerage, viz. the earldom and vis-
 county, became extinct. And it was for this meaning of the word
 "peerage" that the claimant contended.

But there is a third sense in which "peerage" is used, as com-
 prehending all the dignities of nobility held by a peer, and consti-
 tuting the status of any individual peer, whether consisting
 * 743 of one or more dignities, and whether *(if more than one)
 descendible similarly or differently. He is a peer by hold-
 ing any one of those dignities, and is entitled thereby to all the
 rights and privileges of a peer. By holding several dignities he
 is not more a peer, or entitled thereby to any greater or other
 rights or privileges of a peer; although his rank among the peers
 will vary according to his titles.

All the dignities of nobility therefore of each peer constitute
 his status of a peer, his peerdom or peerage. In this sense no

peer can have more than one peerage. And in this sense, on the death of Lord M., his peerage would not be extinct, because a part of it, viz., the barony of C., survived, and continued in his successor.

How, then, is it to be ascertained in which of these three different senses the Legislature used the term "peerage" in that part of the fourth article which empowers the Crown to create one Irish peer on the extinction of every three Irish peerages? I know of no other way than by reading the whole context together, and learning thereby the object and scope of the enactment, and so ascertaining the intention of the Legislature.

The fourth article of the Union relates exclusively to the election of Irish peers and Irish commoners to the two Houses of Parliament of the United Kingdom respectively, and to the manner of holding the Parliaments of the United Kingdom. It enacts that twenty-eight Irish peers shall be elected for life by the existing body of the peers of Ireland to sit in your Lordships' House, and after some other provisions not important to the present inquiry, the article proceeds to provide for the gradual reduction and the permanent preservation, at a fixed number, of the Irish peers, who are to constitute the electoral body to return peers to the Parliament of the United Kingdom.

A general power is first given to the Crown to create *peers of Ireland, and to make promotions in the peerage *744 thereof after the Union. Then comes the proviso, which limits the power to create peers, but leaves unlimited the power to make promotions, evidently because the former affects the electoral body, while the latter does not.

The general scope and object of the enactment appears clearly to be to reduce the electoral body gradually to the number of one hundred, and then to keep it up to that number for the future. But, instead of the reduction being permitted to go on in its natural course without interruption, a limited power is given to the Crown, "so often as three Irish peerages shall become extinct, to create one other peer of Ireland," until the minimum of one hundred be reached; and then to create a peer "as often as any one of such one hundred peerages shall fail by extinction," or as often as any one Irish peer shall become entitled to an hereditary seat in your Lordships' House.

Looking at the whole of the fourth article then, it would seem

to be the clear intention of the Legislature that the Crown's power to create Irish peers should be limited to the filling up of every third vacancy in the electoral body before its reduction to one hundred, and the filling up of every vacancy after such reduction, it being (as therein is alleged) the true intent and meaning of the article that at all times after the Union the Crown should keep up the Irish peerage to the number of one hundred.

Here then are two passages in a short clause of an Act of Parliament, in which the extinction of peerages is mentioned in almost identical language. In the earlier part of the clause "one other peer is to be created so often as three Irish peerages shall become extinct"; and in the latter part a peer is to be created "as often as any one of such one hundred peerages shall fail by extinction."

Now "peerage" in the last passage is free from all doubt, *745 and capable but * of one construction; as indeed the counsel for the claimant admitted in the argument. "Any one of such one hundred peerages" must necessarily mean the peerage of any one of such one hundred peers before mentioned. And there "peerage" must necessarily mean all the dignities of nobility held by any one of such peers, whether one or several, and whether (if more than one) descendible similarly or differently, which is the third sense of the word "peerage" to which I have before referred. Either of the other two meanings of that word would be wholly inapplicable in this passage. The extinction of a single one of such dignities would clearly not entitle the Crown to create a new peer. And therefore it would follow, that if Lord M. had died after the reduction of the number of Irish peers to one hundred, instead of dying before, the Crown would not have been entitled to create a new peer, as upon failure by extinction of one of the one hundred Irish peerages. Because while the barony of C. survived to his successor there would not be the reduction of the number of peers below one hundred, which is the only condition authorising the creation of another peer. It is obvious that "peers" and "peerages" are there used as convertible terms; the extinction of a peerage being the extinction of a peer from the electoral body of Irish peers,—the removal of a voter from the list of voters.

If then the Legislature has used an ambiguous word in a definite sense in one passage of a clause in an Act of Parliament, it is in accordance with the rules of sound construction and legitimate

inference to hold, that the same word is used in the same sense when found in another passage of the same clause, unless any repugnancy or incongruity would result from such construction. But so far from any such consequences following in this case, the whole context and purview of the enactment seem to show * that the meaning of the word "peerage" must be the *746 same in both parts of the clause, in order to accomplish the obvious intention of the Legislature. And then the extinction of three peerages would be construed to mean "the extinction of the peerages of three peers." If, on the contrary, the claimant's construction of the word "peerage" in the first part of the clause were to prevail, the same words must be used in different senses in the same clause, although no reason has been suggested in the argument at your Lordships' bar for so unusual a mode of construction. Whereas if "extinction of peerages" in both cases has reference to the diminution of the electoral body by making vacancies therein, the whole clause is clear, consistent, and reasonable.

But it has been argued on the part of the claimant that the construction of the earlier part of the clause ought not to be affected by the construction of the latter part; and that in order to arrive at a safe and satisfactory conclusion in this case, your Lordships ought not to read beyond that portion of the fourth article which gives power to the Crown to create a peer on the extinction of three peerages. I entirely differ from this view, which is at variance with the rule laid down by Sir Edward Coke (Coke upon Littleton, 381 *a*), in these words: "It is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute; for that best expresseth the meaning of the makers."

An attempt was also made on the part of the claimant to found an argument against the application of the third meaning of the word "peerage" to the phrase "extinction of three peerages," upon the clause defining what shall be deemed an extinct peerage. It was urged that the language in that clause confines the term "peerage" to one of the two first mentioned meanings, and excludes it from the *third. But the answer, I think, is *747 plain and conclusive, that the definition of an extinct peerage is equally applicable to peerages before and after the reduction of the electoral body of peers to one hundred. And, as it is conceded, that notwithstanding that definition, "peerage" must be

taken in the third sense in the passage referring to the extinction of peerages after the reduction to one hundred, that definition can be no bar to a similar construction in the passage referring to extinction of peerages before the reduction to one hundred.

For these reasons I should have thought, quite independently of the usage which has so long prevailed, that your Lordships' question ought to be answered in the negative. But I feel more confidence in the conclusion at which I have arrived when I find that the Act of Union has been invariably so construed ever since it was passed. In Stephen and Gosnold (*Vaughan's Reports*), 169, Lord Chief Justice Vaughan lays it down that "where the meaning of a statute is dubious, long usage is a just medium to expound it by. For *jus et norma loquendi* is governed by usage. And the meaning of things spoken or written must be, as it hath constantly been received to be, by common acceptation." And that very eminent American jurist, Chancellor Kent, also says (1 *Kent's Commentaries*, part 3, lecture 20, page 465): "In the construction of statutes the sense which the contemporary members of the profession had put upon them is deemed of some importance, according to the maxim *Contemporanea expositio est fortissima in lege*."

Then how stands the case upon usage? Although Lord M.'s earldom became extinct within two years after the Union, and although six or seven other dignities of nobility similarly circum-
 *748 stanced have from time to time * become extinct down to the present day, and although many Irish peers have been created, these extinct dignities of nobility have been passed over by the advisers of the Crown, and none of them has ever been used as an extinct peerage within the Act. Lord Norbury's peerage, indeed, has been referred to as an authority in favour of the claimant. It has also been cited by his opponents as an authority against him. But I do not think that it has any very strong bearing upon the present case. At all events, it does not prove that any extinct dignity similarly circumstanced to Lord M.'s earldom has ever been treated as an extinction within the Act of Union. For the creation of the Earl of Norbury was after three undisputed extinctions. The Crown, therefore, had the clear right to create a new peer; but instead of doing so the Crown promoted an existing peer to an earldom (which could have been done without any extinction), and then by way of remainder,

created a new peer *in futuro*. Whether this was right or wrong, it would seem that the Crown did not exceed its authority, but rather omitted to avail itself of its full power. My opinion, therefore, is that the extinction of the earldom of M. in 1802 was not an extinction of a peerage according to the true construction of the Act of Union; and that such extinction, together with the extinction of the two peerages before the year 1855 did not entitle the Crown to create a peer of that part of the United Kingdom called Ireland.

MR. JUSTICE WILLIAMS. — My Lords, I am of opinion that the extinction of the earldom of M., in 1802, was not an extinction of a peerage of Ireland, according to the true construction of the Act of Union; and that such extinction did not, together with the * extinction of the two peerages before the * 749 year 1855, entitle the Crown to create a peer of that part of the United Kingdom called Ireland.

Having regard to the whole of the article in question, I think its general intention appears to be: 1st. That until the number of the peers of Ireland is reduced to one hundred, the Crown shall be entitled to create a peer as often as the number of existing peers is diminished by three. 2dly. That when the number is reduced to one hundred, the Crown shall be entitled to create a peer as often as that number is diminished by one; so that the number of one hundred may be kept up.

As to the latter portion of this statement of the general intention of the article, no doubt has been raised. Nor has it been disputed that, according to that intention, the Crown cannot, after the number of peers is reduced to one hundred, create a peer on any extinction of a peerage which does not diminish that number. Consequently, it must be conceded that if the extinction of the earldom of M. had occurred after the number of peers had been reduced to one hundred, it was not intended by the Legislature that such extinction should entitle the Crown to create a peer; because such an extinction would not have diminished the number of peers, and the creation would augment it to one hundred and one.

Now, what is the language in which this undisputed portion of the general intention of the article is expressed? The article provides that if it shall happen that the peers of Ireland shall be reduced to the number of one hundred, then and in that case it

shall be lawful for the Crown to create one peer "as often as any one of such one hundred peerages shall fail by extinction." Here it is manifest that the word "peerage" is not used in its general sense; for the peerage spoken of is something the failure of * 750 which by extinction * will diminish the number of one hundred peers. It must then be used, as it appears to me, in the sense of "status," or "condition of a peer." And the article intends to entitle the Crown to create a peer as often as the number of such status or conditions is diminished by an extinction of one of them.

It remains to consider what is the language in which the earlier disputed portion of the general intention of the article is expressed. The Crown may create one peer of Ireland, "so often as three peerages of Ireland shall become extinct." The question is, in what sense is the word "peerage" here used? Now, in this place also, as well as in the latter part of the article, it is manifest that the word is not used in its general sense; for if it were, then in the case (by no means rare) of the death of a peer without heirs male of his body, who had two peerages in him, each limited to such heirs male, two peerages would become extinct within the meaning of the statute; which, it is conceded on all hands, was not the intention of the enactment.

As, then, some particular meaning is to be sought for the word, it surely may most properly be found in that construction which must necessarily be applied to it with regard to the latter branch of the same provision.

On these grounds, I am of opinion that, as the extinction of the earldom of M. in 1802 was not an extinction of the status or condition of a peer which existed in the last earl, it was not an extinction of a peerage according to the true meaning of the Act of Union.

With respect to the evidence which your Lordships have ordered to be laid before us of the *contemporanea expositio* of the statute, I feel some doubt whether that principle of construction is applicable to the present inquiry. But assuming that it is, the evidence, perhaps, is not very * 751 cogent against one of the arguments used in support of the affirmative of the questions put to us by your Lordships, viz. the argument that the true meaning of the word "peerage" in that part of the article immediately under consideration is, such a peerage as exists when a

peer has a single such hereditary dignity, or if he has more than one, then such a peerage as is limited in a different line from the other, so that the two dignities may possibly result in two coexisting peers. The earldom of M. might certainly have descended to some person who was the heir male of the body of the first Earl of M., though not the heir male of the body of the Earl of M. who died in 1802, while the barony of C. passed to C. D.; so that the two peerages which were in that earl might have been vested in two coexisting peers. And (excepting the instance of the peerage in question) the Herald's returns exhibit, I believe, no case of the death of a peer of Ireland having two such peerages in him. But though these returns may furnish no very strong answer to this argument, the argument itself appears to me to require so peculiar and difficult a meaning to be attributed to the language of the statute, that I much prefer resorting to that which the statute itself has supplied in the terms of the latter portion of the article.

MR. JUSTICE WIGHTMAN. — I am of opinion that the extinction of the earldom of Mountrath, in 1802, was not an extinction of a peerage of Ireland, according to the true construction of the Act of Union.

By the fourth article of the Act, it is agreed that his Majesty and his successors may create peers of Ireland, and make promotions in the peerage thereof after the Union, provided that no new creation of any such peers *shall take place until *752 three of the peerages of Ireland existing at the time of the Union shall have become extinct.

A peerage is the state and dignity of a peer; and it is said by Lord Coke, in the Second Institute, page 29, that, though there are divers degrees of nobility, as dukes, marquesses, earls, viscounts, and barons, yet all of them are comprehended under the word "Pares." They are peers to one another, though of several degrees. In a previous passage, at page 6, he says: "Regularly all noblemen are barons, whatever rank they may hold in the peerage; and in ancient records 'the barony' included all the nobility of England." In the passage which I have cited from the fourth article of the Union, the term "peerage" is used as expressing the state and condition of a peer, and not any dignity which would entitle the possessor to that state and condition. His Majesty, it is said in that article, "may make promotions in

the peerage thereof," but may not create a new peer "until three of the existing peerages shall have become extinct." A promotion would be no addition to the peerage; a new creation would; and that is not to take place until three of the existing peerages shall have become extinct; that is, until three extinctions of the state and dignity of a peer. A peer may have several titles of honour and degree, but only one peerage. He has only one vote or voice as a peer, though he may have several titles of honour and dignity.

Charles Henry, the last Earl of Mountrath, at the time of his death was a peer of Ireland, with the titles of honour and dignity of Earl of Mountrath, Viscount Coote, and Baron Castlecoote. Each of these dignities would by itself have entitled him to the peerage of Ireland, but conjoined they did no more. He was a peer of Ireland with those several dignities or titles of
 *753 honour. He was as much *entitled to his peerage by his barony of Castlecoote as he was by his earldom of Mountrath. Upon his death his earldom, viscountcy, and one of his baronies became extinct, but not his peerage, which still continued in the barony of Castlecoote; three dignities or titles of honour became extinct at his death, but not a peerage, according, as it seems to me, to the intent and meaning of the fourth article of the Act of Union.

The latter part of that article indicates the meaning of the word "peerage" as used in it. It says: "That if it shall happen that the peers of Ireland shall by extinction of peerages or otherwise be reduced to the number of one hundred, exclusive of such as may be peers of Great Britain or of the United Kingdom, then his Majesty may create one peer of Ireland so often as any one of such one hundred peerages shall fail by extinction, it being the true intent and meaning of that fourth article that it shall be lawful for his Majesty to keep up the peerage of Ireland to the number of one hundred." It is quite clear that in this part of the article by the term "peerage" is not meant the title or titles of honour or dignity which would give a peerage, but the actual state and dignity of a peer, whether with one or many titles, otherwise the number of Irish peers might be reduced to one hundred, whilst the number of Irish peerages would be much greater.

As the construction of the Act of Parliament must depend upon the meaning and intention of the Legislature at the time it was

passed, the mode in which the power given to the Crown by the fourth article has been dealt with since it has been passed may possibly not be entitled to any great weight, otherwise it will be found by the instances given in the returns of Irish peerages created since the Union, that not one occurs, in which a peerage has been treated as extinct, if one of several dignities, * each * 754 giving by itself a peerage, has been continued, though other dignities, in the same person, equally entitling him to the peerage have become extinct.

If the last Earl of Mountrath had died leaving a brother, who would have been heir in tail male of the body of the first lord, there would, upon the death of the last earl, have been two peers and two peerages. The brother would have succeeded to the earldom of Mountrath and the viscountcy and barony of Coote, and the distant relation to the barony of Castlecoote. The last earl had in him such dignities as would make two peerages had there been persons who could take them separately; but when conjoined in his person, they made but one peerage in him, according to that which I consider to be the true construction of the Act of Union, which peerage did not become extinct upon his death, but was continued in the barony of Castlecoote.

For these reasons I think that the extinction of the earldom of Mountrath was not an extinction of a peerage of Ireland, and that the extinction of the earldom, together with the extinction of the two peerages before 1855, did not entitle the Crown to create a peer of Ireland.

MR. JUSTICE ERLE. — Your Lordships' question turns on the meaning of the word "peerage," in that clause of the Act of Union which subjects the power of creating a new Irish peer to the condition that three of the then existing peerages should have become extinct.

In support of an affirmative answer, it has been contended that "peerage," in common understanding, denotes a title of dignity. For example, when the earldom of Mountrath was conferred on a commoner, a peerage was conferred. An earldom, therefore, which was a peerage in * its creation, ought also to be * 755 construed to be a peerage in its extinction, there being nothing in the context (as it is said) to show that an unusual meaning was intended.

But in my opinion the answer ought to be in the negative. "Peerage" in common understanding denotes the aggregate of qualities which constitute a peer; and although it can neither come nor go without being accompanied by a title of dignity, it is distinct therefrom, peerages being the results of titles, and not the titles themselves.

Peerage in its essence seems opposed to the prominent property of titles. The root of peerage is equality, and some relation of equality pervades its use, even when furthest removed from its origin.

In the time of Magna Charta, the judgment of his peers secured thereby to a freeman was the judgment of freemen, peers to himself in respect of equal rights, and in the present day your Lordships are peers to each other in respect of the equality of rights, duties, and privileges common to every peerage. But the possessors of titles in respect of their titles are essentially unequal to each other, not only in the degree of the title, but in the precedence due to titles in the same degree. When a new peerage arises from conferring a title on a commoner, it is at once complete and unalterable; the same for the latest barony and the most ancient dukedom; the same whatever be the number of titles held, the source from which they originate, the times when they may vest, and the lines of devolution in which they may come. Peerage is inseparably connected with title, in so far as some title is a necessary condition for its existence. Still, as when once created, it is unaffected by any addition or subtraction of titles provided one remain, abstractedly it is distinct from title itself.

*756 * Beyond denoting the personal status of a peer ending with his life, peerage is capable of comprising the notion of inheritance. And when a title comes from an ancestor, or is created with a limitation to successors, the peerage resulting from such a title is hereditary, and the possessor for the time of such a peerage, though he must part with it at death, still holds while alive a possession that is to be perpetual through all the successors in the limitation. And if many such titles coming in different lines, as from father and mother, converge to one peer, subject to diverging again at his death without issue, though the immediate successors to him may be many peers, still during his life he holds one peerage only, and it is not the more multiplied in him by

reason that his collateral successors will be at once numerous peers, than it is in the case of the lineal descent of one title, by reason that there will be a series of numerous peers.

The context of the clause in question shows that existing hereditary peerages in this sense were meant. The number of Irish peers is to be reduced to one hundred, by making the decrease to the increase as three to one. If "peerage" is taken in the sense above submitted, this purpose will be effected; but if it is taken in the sense of "title" it may be defeated, as by the death of one peer many titles may become extinct, and there might be more creation than extinction.

Also the context marks the distinction between peerage and title. By the clause, the power of creating peers is limited, while the power of making promotions in the peerage is unlimited. A promotion in the peerage (that is, in the collective body of peers) is the grant of a title to a peer, which confers no peerage; while the creation of a peer is the grant of a title to a commoner, which does confer a peerage.

* Furthermore, in this clause "peerage" is unequivocally *757 used in the sense here submitted. When the number of existing peers shall have been reduced to one hundred, a power of creating a new peer is given as often as one of such peerages shall fail by extinction, so that the number of one hundred shall be kept up. It is clear that a peerage would not be extinct within the meaning of this passage, unless a peer died without a successor to the peerage he held.

Where a word is capable of two meanings, the context is a better resort for deciding which is intended, than a preference for the ordinary over the extraordinary meaning. If a word has two meanings, each is equally at the option of the author; and it is his intention that is to be found. There may be no test to try which is the ordinary meaning; if there is, it must be brought from the author, not from the interpreter. The meaning that may seem ordinary here, may be strange at a distance. "Peerage," in 1800, denoted a complex idea comprising intricate conventional relations of social life; and if it has several meanings, a claim by any one of them to be preferred as ordinary and natural would be a subject of dispute. Still, if the construction is to be sought from the word itself, the meaning above offered may possibly have appeared to those who framed the statute to be primary and appropriate.

MR. JUSTICE CRESWELL. — The answer to be given to the question proposed by your Lordships depends upon the construction to be put upon that part of the fourth article in the Act of Union, 39th and 40th Geo. 3, c. 67, which relates to the creation of peers of Ireland. [His Lordship read it. See ante, 719.]

The thing to be ascertained is the meaning of the word “peerage” in this part of the article. For this purpose it
 *758 * seems to me that we may with propriety look at the latter part of the article where the same word is used in a manner that leaves no doubt as to the meaning to be there ascribed to it. [His Lordship read it.]

In this part of the article, by “extinction of a peerage” is certainly meant an event which will cause a diminution of the number of one hundred peers, and the word “peerage” is not used in the sense of title or dignity, but as comprising the whole right of any person to the status or condition of being a peer. Now it is reasonable to suppose that the same word was intended to bear the same meaning in different parts of the same article, unless such a construction would lead to some incongruity, or defeat some manifest intention of the Legislature; I cannot find that it would do either.

The primary object of the article appears to have been to effect a gradual reduction of the number of Irish peers until they should be brought down to one hundred, and then to maintain that number. A secondary object appears to have been to give to the Crown, during this process of reduction, power to create new peerages, bearing a certain proportion to those which from time to time become extinct. The intention to effect this reduction, and to give a power to create new peers, thus limited, is further manifested by the provision, that before any new peers can be created, three peerages “which shall have existed at the time of the Union shall have become extinct,” which words exclude from the computation any peerage which became extinct before the Union.

But upon these words an argument has been founded on the other side, and it has been said, that if two peerages had existed in A. and B. at the time of the Union, and had afterwards vested in C., and on his death had become extinct, two peerages
 *759 which existed at the time of the * Union would have become extinct, and consequently that as the earldom of Mountrath was a distinct peerage before the barony of Castlecoote

was created, the extinction of that earldom in 1802 was the extinction of a peerage. But I am of opinion that no such consequence follows. It seems to me that if a peerage vested in A., and another vested in B., and both descend to C., he has but one peerage with two titles. If on his death both titles fail, his peerage is extinct; if one title only fails, the peerage remains. But assuming that in such case the consequence contended for would follow, it would not dispose of the question asked by your Lordships, for the earldom of Mountrath and the barony of Castlecoote never existed in different persons, nor does it appear that when the barony was created it was possible that they should do so.

I am therefore of opinion that the extinction of the earldom of Mountrath in 1802 was not an extinction of a peerage of Ireland according to the true construction of the Act of Union; and that such extinction, together with the extinction of the two peerages before 1855, did not entitle the Crown to create a peer of that part of the United Kingdom called Ireland.

MR. JUSTICE COLERIDGE. — My Lords, I am of opinion that the questions propounded in this case by your Lordships should be answered in the negative; they are substantially one, and having been already stated more than once, I need not repeat them.

Your Lordships have very wisely, if I may be pardoned the use of such an expression, directed our attention specifically to the true construction of the Act of Union. And although it must be presumed that the general law of peerage was present to the minds of those who framed that * Act, and therefore * 760 ought to be present also to those who are to construe it; yet, as a very special and exceptional kind of peerage was thereby created, it is of more importance to ascertain what the intention of the Legislature was, and to seek for that construction which, without any straining of the words, may most satisfactorily effectuate that intention. I do not mean to intimate that I find any thing in the general law which conflicts with that specific intention, but to intimate the general course of the arguments I shall use.

Now it is quite clear that the general intention of the fourth article of the Act of Union in this part of it was to provide for the maintenance of an Irish peerage after Ireland should have ceased to be a separate kingdom; distinct from, however closely

connected in many particulars with, the peerage of the United Kingdom; gradually to reduce the numbers; and if the number of Irish peers should ever fall to one hundred, to maintain it at and limit it to that number.

The effect of the first article of the Act of Union was necessarily to determine the ancient prerogative of the Crown as to the creation or promotion of peers for Ireland; and had the third article been left to stand alone, it might have been reasonably contended that the then existing Irish peerage would have been thereby united to that of Great Britain, and that all the then existing Irish peers would have become lords of the Parliament of the United Kingdom. Both these consequences were to be provided against or modified. The regulations as to the prerogative I shall consider presently; those as to the peerage itself were very important. The Irish peers, as such, were no longer to be lords of Parliament; they were to be at liberty even to forego the rights and privileges of peerage, and become for a time substantially commoners; sitting as commoners in the Lower

*761 House, with all the liabilities and *qualifications of commoners; a thing entirely inconsistent with the general law of peerage; such of them as did not elect that course were to form a constituent body, out of and by which twenty-eight lords of Parliament were to be elected for life to represent the lords temporal of Ireland in the Parliament of the United Kingdom; and the normal number of that constituent body, to be arrived at surely and gradually, was to be one hundred.

So much being premised, I proceed to consider that part of the fourth article which gives the power of creating such peers as I have been describing, and making promotions in the Irish peerage thus constituted. The section begins with giving to the Crown the power as to both without any restraint; but a proviso immediately follows as to creation, that no new creation of any such peers shall take place after the Union until three of the peerages of Ireland existing at the time of the Union shall have become extinct; and upon such extinction of three peerages it shall be lawful for the Crown to create one peer, and in like manner so often as three peerages shall become extinct one other peer may be created. This is the power and this the regulation of it, applicable both to peerages existing before the Union, and created since, so long as the total number exceeds one hundred; and

although, when the article speaks of creation, it uses the term "peer," when of extinction, "peerage"; I do not conceive that any opposition is thereby intended; but a numerical ratio was prescribed between extinctions and creations, the object of which certainly was to reduce the number of individual peers, holders of peerages, by restraining the power of ennobling any one person until three peerages, three of those things, however defined, which had conferred nobility on three persons holding them, had come to an end.

But the article proceeds to enact what shall be done * when the number shall be reduced to one hundred. Noth- *762
ing can be clearer than that when the number of one hundred is reached, it is a term or condition which applies equally to peer and peerage. It is assumed that when there are no more than one hundred peers there will be at the same time no more than one hundred peerages, and that the death of one such peer without issue or remainder-man to succeed will extinguish but one peerage; and yet it must have been very well known that the one hundred peers would have among them more than one hundred titles of dignity; and the same article had given the Crown an unrestrained power of promotion; that is, of cumulating titles of dignity on the same individual peer. But if such cumulation, where the limitations of descent were varied, gave to the holder a new and distinct peerage in the sense contended for, the death of one peer without remainder-man or issue might make more than one vacancy, as the creation of one with two titles would add more than one peerage to the limited number.

The section concludes with an express statement of the true intent and meaning of the whole article as to this matter of the peerage. These words intimate, I apprehend, in the decorous language suitable in regard to the Crown, not only the power but the duty of the sovereign to keep up the Irish peerage to the full number of one hundred when it shall have been reduced to that number, as the preceding specific provisions had virtually restrained the sovereign from creating peers so as to exceed it.

And this is precisely what might have been expected, when such a constituent body was to be formed, out of which a definite number of lords of Parliament was to be elected. It was fitting that there should be such a numerical proportion between the electors and elected as to make the election free and respectable, out of

the reach of all external influences ; and also that the proportion should be fixed * and always maintained, that the numbers might not, for indirect purposes, be allowed to diminish, or be subject to sudden additions, so that the people of Ireland should have guaranteed to them at all times a proportion of the House of Peers elected from a known, certain, and sufficient body of their own peculiar peerage.

The question to be solved is, under what circumstances does a peerage become extinct, where the same person holds more than one dignity descendible according to different limitations, and two propositions are submitted. On the one hand, it is said that any peer who holds two or more dignities descendible according to different limitations, whether created by one or more patents, holds so many distinct and independent peerages, and upon failure of a remainder-man to take any one, a peerage becomes extinct ; and on failure of remainder-men to take all, so many peerages as the peer holds dignities will become extinct ; as if, instead of one, there had been the deaths of so many individuals. On the other hand, it is said that, in the case supposed, however many dignities the peer has, he is but one peer and has but one peerage, which does not become extinct so long as there is any holder qualified to vote by virtue of it ; in other words, until all the dignities fail for want of a qualified heir to take, and on that event happening one peerage only is extinct. Let these two propositions be applied to a system in which you are to reconcile an unlimited power of promotion with a certain fixed number of individual peers, electors and elected, and to a provision, one main object of which was to reduce surely and gradually, in an arithmetical ratio, the number of peers down to a smaller number, at which it was to be permanently maintained.

I do not assert that the latter proposition is wholly free *764 from difficulty ; some supposable difficulty seems to me *inherent in the case, however the article may be construed ; but I say the former will be found to abound with difficulties, and directly to tend to create them. I must admit that if we suppose A., a baron, with remainder to B., promoted to an earldom, with remainder to C., and that he dies, leaving B. and C., there will then be two peers and two peerages ; and if the number of peers before A. died had been just one hundred, there will now be one hundred and one. But this is rather a practical difficulty than a difficulty

in the argument. As a practical difficulty, it is of the same sort as that which the article itself in another part contemplates, where a peerage has been erroneously supposed to be extinct; and I presume it would be rectified in an analogous manner, by not creating a new peer until four instead of three following extinctions. As a difficulty in the argument, the answer is, that because the two dignities now devolved on two different persons, B. and C., confer on each of them a peerage, it by no means follows that they constituted two peerages in A., so that he dying without remaindermen to take one or both of his titles, there was an extinction of one peerage in the first case, or two in the second. And your Lordships' question turns upon what happens in the case of extinction, not on what happens where there are remaindermen to take.

I should not venture to speak with confidence on a subject full of antiquarian difficulties; but it has been supposed, on very reasonable foundation, that peerage, as we now have it, grows out of tenure by barony, and that the right and duty of attendance in the legislative assembly may be traced to the obligation to attend and perform certain duties in the King's great Court. From this it follows, that just as the freehold tenant of a manor, or baron, as he was frequently called, however many tenements he might hold, did but attend in the Lord's Court as one tenant or *baron; *765 and the tenant by barony, however many fiefs he might hold by such tenure, did but attend as one peer or baron in the King's great Court, so now the peer, however many dignities he may have, sits in the House only as one peer, in respect of one peerage. It is notorious that, in fact, he counts but as one; that as a peer, however many or high dignities he enjoys, he is merely equal with other peers; that he exercises no functions but as one peer; and should he die leaving no remainderman to succeed to any of his dignities, though many dignities and titles may fail, one peerage only is extinct; all which is quite consistent with two or more peerages coming into active existence if he should leave two or more remaindermen to take up his several dignities.

But however this may be generally, the construction here must be of the specific article with a view to the specific intention, and on the specific circumstances of the case. Now the opposite theory is directly inconsistent with the whole scheme of the article. Unlimited promotion may well be reconciled with limited creation

according to the other view, but it cannot, according to the theory now under consideration. If an earl, promoted to be a marquis, has in him two peerages, so that on his death without remainder-man, two peerages become extinct, it is obviously in the power of the Crown indefinitely to postpone the reduction of the existing Irish peerage to one hundred, and when so reduced, it may indefinitely enlarge the number beyond one hundred. I know it would not be seemly to argue on a supposed breach of its constitutional duty by the Crown; but when we are considering a great organic measure like the Union of the two kingdoms, when in some sort the

legislative constitution of both was under consideration and * 766 to be new modelled; and when it is * manifest that it was intended to entrust the Crown only with a guarded prerogative, and to impose on it a great constitutional duty, and when further it may be presumed that all these subjects occupied the attention of the great constitutionalists of both countries, it cannot be unreasonable to take into account the consequences which this or that construction of the article might involve.

It is not contended that where the two dignities are made descendible according to the same limitations, the death of the holder without a remainder-man occasions the extinction of two peerages. It is of course convenient for those who answer your Lordships' question affirmatively, so to limit the proposition; but I would ask, on what principle is this distinction founded? Why are not the two dignities equally two distinct peerages in the holder in the one case as in the other? If you say that it depends on the possibility of there being two persons to succeed in the one case, and the impossibility in the other, I still ask for the reason why this circumstance should be the cause of this great effect? why we should therefore pronounce that the holder in the one case of an earldom, added to a barony, has but a superadded title or dignity, and in the other a distinct peerage? In both cases equally the former baron has become earl, with exactly the same rights and pre-eminences conferred by exactly the same form of words.

I admit that there is danger in applying, without much discrimination, the principles of the law as to the grant, descent, or limitation of estates to the peerage; but it certainly requires some clear authority to warrant us in saying that the same grant shall vary so essentially in the interest it conveys to the first taker, according to the limitation in remainder being the same with or differing

from that in * some preceding grant of nobility to the same * 767 first taker, or some one under whom he claims. I could understand a doctrine of consolidated, or dormant, or potential peerages which may in the one case divide, or awaken, or come into activity, and which cannot in the other; this would be intelligible; but how is this doctrine applicable to the case of extinction, where the event does not happen which is to produce the change? I do not forget that in the case submitted by your Lordships, a remainder-man was found to succeed to the barony; but I do not see how that differs the case as to the earldom; if, according to the doctrine supposed, this was a potential peerage during the last earl's life, nothing ever occurred which brought it into actual existence.

I have more than once observed that we must seek a construction which will practically reconcile an unlimited power of promotion with a restrained power of creation; but I will now ask, in what respects does promotion differ from creation, if you understand by it the making a new peerage in the person promoted? The only difference will be, that a peer must be the object of one grant, and a commoner of the other; but the grant itself will be the same, the same, too, in possible mediate consequences, so as directly to defeat the clear object, that, namely, of restraint on the power of creation.

For these reasons, I conclude that the extinction of the earldom of M. in 1802 was not an extinction of a peerage of Ireland, according to the true construction of the Act of Union.

It appears to me from the returns of the creations since the Union, that the practice has corresponded with the opinion I have ventured to submit; but as no case has before this come for the decision of this House, and the question is upon the construction of words found in a * modern Act of Parliament, * 768 I have thought it safer not to found my opinion upon what seems to me hardly to fall within the proper application of the argument from *contemporanea expositio*.

MR. BARON ALDERSON. — The question put by your Lordships to her Majesty's Judges depends on the true construction to be put on the fourth article of the Act of Union, 39 & 40 Geo. 3, c. 67, by which the rotation and election of the Lords spiritual and temporal who were to sit in the united Parliament of Great Britain and Ireland was provided for.

Passing by the rotation appointed for the Lords spiritual, we find that it was provided that twenty-eight Lords temporal were to be elected in the House of Peers for Ireland for life, to serve in the Parliament of the United Kingdom ; but then, inasmuch as, by the very fact of the Union itself, Ireland became an integral part of the United Kingdom, and the Crown (as was the case after the union with Scotland) thereby lost the prerogative of creating peers in future, except peers of the United Kingdom, it was specially provided, in order to obviate this consequence, that a power, notwithstanding the Union, should still be retained by the Crown of creating new peers of Ireland, limited to the creating one for three vacancies, until the whole number of peers of Ireland, not being also peers of the United Kingdom, should be reduced to one hundred ; and then on every vacancy by a new creation to supply it ; and so to keep up that number of one hundred in all future time.

Now the limited power given, which, being one not within the ordinary prerogative of the Crown, when limited by the fact of the Union itself, must not be extended by construction, was this :

that it should be lawful to create peers of that part of the
 * 769 United Kingdom called Ireland, * and to make promotions
 in the peerage thereof after the Union ; with, however, this proviso, which is confined to new creations of peers, that no new creation of peers of Ireland shall take place until three of the peerages of Ireland, which shall have been existing at the time of the Union, shall have become extinct, and then that one new peerage, in the place of the three becoming extinct, may be created. And it further provides that if the peers of Ireland shall, by extinction of peerages or otherwise, be reduced to the number of one hundred (not being peers of the United Kingdom), then the number of one hundred shall be kept up by new creations.

Now, I think that an ordinary plain man, only seeking to find the intention of the Legislature, cannot read this without arriving at the conclusion that the extinction of the three peerages must be an extinction which reduces *pro tanto* the number of peers remaining, preparatory, in fact, to such a reduction as will ultimately leave only one hundred peers remaining ; and if this be so, some construction must be put on the words " three peerages " which will have that effect, especially when at the end of this section it is emphatically stated to be the true intent and meaning of this

article of the Union to have this number of one hundred (after the reductions in number before provided for) kept up in all time to come.

Then, can we reasonably put a construction on the word "peerages" such as may effectuate the plain object of this article of the Union? I think we can; and that we do but put the right meaning on it in so doing.

A "peerage" means properly the "status of a peer," that is to say, the right in an individual to exercise certain privileges, political or personal, equally with a body of others similarly situated with himself. The Crown has the power of conferring these privileges, and it does so by conferring a barony, or a viscounty, or an earldom, or a marquissate, * or a dukedom. *770 The possessors of all these become and have the status of peers, obtain the peerage, hold the peerage as long as they hold them or any of them. But each, let him hold as many as he may like, is but one peer, and has but one peerage, the result it may be of any one, or of all of them put together. It is a mere popular phrase to say that a barony is a peerage. The correct phrase is, that the possessor of a barony is a peer, or that the possession of a barony confers a peerage. No one man can have two peerages, if we speak accurately. He may have a barony and an earldom, but he can only have one status of peerage, for (equality admitting of no degrees) peerage is in its very nature one and indivisible. It would be somewhat strange to say that A. was twice as equal to H. as B., who was equal to him also. It is true that an individual may have two patents, one for a barony, and a second for an earldom, just as he might have two landed estates, supposing that each of such estates would confer on him the status of peerage. But surely if one of such estates were swallowed up, like Earl Goodwin's, by the sea, and the other estate remained, his peerage would be in no respect altered thereby.

If I am right in this, it renders the construction of the fourth article simple and easy. A peerage is extinct as soon as a person having such rights dies, and leaves no one behind on whom the status of peerage descends in succession from him. In such a case, it is obvious that it must always happen that the aggregate number of peers is less by one on the death in question if he has no person at all to succeed him as peer. The body is then diminishing towards the number of one hundred in such an event. A second

a new line of descent is not a promotion from a barony in the peerage. No one can doubt that by promotion was meant a promotion with the same line of descent in both the earldom and barony. It might possibly be more easy to contend that it was not a new creation within the Act, but a *casus omissus*. For as Lord Norbury was a baron already, it perhaps could not be a new creation of him as a peer. The Crown, and those who advised the Crown, however, thought otherwise; and it is not necessary to discuss whether they came to a right conclusion. At any rate the case has, I think, no bearing upon the present question.

For these reasons, I answer your Lordships' question in the negative.

* 774 * LORD CHIEF BARON POLLOCK. — My Lords, the question which your Lordships have proposed to the Judges appears to me to turn altogether upon the sense in which the word "peerage" is to be understood in the fourth article of the Act of Union between Great Britain and Ireland. It is, I think, to be regretted that the word is manifestly used in more than one sense in the same passage. In the sentence where it is declared to be the true intent and meaning of the article, that the Crown may keep up the peerage of Ireland to the number of one hundred, the word "peerage" obviously means the peers of Ireland as a body. But the question your Lordships have proposed turns upon what is meant by "the peerages of Ireland existing at the Union, which may become extinct, and upon the extinction of three of which it shall be lawful for the Crown to create one peer of Ireland," which creation (it may be inferred from the language used) is considered to be a new creation, as distinguished from a mere promotion, which is therefore not a new creation.

It may assist in obtaining the reasonable and true construction, to ascertain precisely where the difficulty arises, and how much, and what appears to be free from doubt on either side of the question. On the one hand it seems to be admitted that a mere promotion is not a new creation. This is the natural and obvious conclusion from the language of the fourth article itself. It would follow that the same peer, promoted to a higher title through any number of the successive ranks of the dignity, has only one peerage, how many titles soever he may enjoy; and if such promotions took place in different generations of the family, instead of all

being conferred on one individual member of it, the result would, I think, be the same, and there would be one peerage only, though with several (perhaps many) titles.

*This is in accordance with the practice since the Union. *775
If the mere promotions before the Union are to be considered distinct peerages, there would be in the return of peerages of Ireland created since the Union, and the supposed extinctions on which they have been founded, no less than seventeen extinctions which have not been acted upon, by the creation of new peers, from the death of Sir Ralph Gore, Earl of Ross, in 1802, who was made Baron Gore in 1764, Viscount Belleisle in 1768, and Earl of Ross in 1771, to the death of Francis James Earl of Llandaff in 1833, who was created baron in 1783, viscount in 1793, and earl in 1797. Some of these are creations and promotions of the same individual, some of them of the same family, in different generations. If to these be added the cases where the dignities of viscount and baron were conferred by the same patent, the number would be four more, and the total would be twenty-one.

In the return made pursuant to an address of your Lordships' House, of 18th May, 1855, the earldom of Tyrconnell is put down as one extinct peerage only, and the viscounty of Melbourne as another. In fact, the barony of Carpenter was created in 1719, and the third baron was created Viscount Carlingford and Earl of Tyrconnell in 1761. So the first Lord Melbourne was created baron in 1770 and viscount in 1781. If each of these creations is to be considered as a distinct peerage, the number of extinct peerages not followed by creations would be twenty-four at least, and the Crown has at this moment the power of creating no less than eight Irish peers.

These instances, so numerous, and spread over so long a period (upwards of half a century), must, I think, be considered as establishing the principle, that mere promotion, whether of the same individual or of the same family represented successively by different individuals, does not * create a new peer- *776
age, but is merely an advancement in the dignity of the peerage by the addition of a higher title. And it may be observed with respect to all the early practice under the Irish Act of Union, that it was introduced by those statesmen who had framed and carried the measure, and who probably understood what they meant by it.

Some doubt may, however, be entertained in the case of a junior member of a noble family being created a peer, and afterwards succeeding to the ancient honours of the house; while separate, there can be no doubt the peerage thus created would be distinct, and the failure of heirs to the junior branch would produce an extinction of the junior title, and with it, of a peerage. But what would be the case upon the junior branch succeeding to the honours of the elder line? would this produce a merger of the honours of the junior branch, so that an heir common to both would have but one peerage, although enjoying titles derived from more than one ancestor, and more than one creation? On the one hand, it might be argued that if the peerages were distinct and separate before they became united in the same person, they would continue to be so afterwards. On the other hand, it might be contended that the existing representative of the family is to be considered as if all the honours of the house were conferred upon himself, from how many sources soever he may derive them, and in that view, there would be but one peerage. I cannot find that this case has ever occurred since the Union with Ireland, so as to shed, by the practice, any light upon the question of the principle.

The same or a similar question might be raised where a peerage has been conferred upon the wife of a commoner, who afterwards became himself ennobled by another or the same title, would the issue possess two peerages, or one only within the meaning * 777 of this clause in the Act of * Union? This has not unfrequently happened to eminent statesmen and lawyers. The late Earl of Chatham inherited the earldom from his father, and a barony from his mother. On his death were two peerages extinguished, or only one? One instance, at least, of this latter question has occurred, and it has received a practical solution in the case of John Viscount Kilwarden. The wife of the first viscount was created Baroness of Kilteel before he was ennobled, but on the death of the son, who inherited three titles, viz. the barony of Kilteel, conferred upon his mother in 1795, the barony of Kilwarden, conferred upon his father in 1796, and the viscounty, conferred in 1800, it appears to have been considered that the extinction of one peerage only had occurred. The barony conferred on the mother, and the barony and viscounty conferred on the father, were considered to constitute but one peerage in the

son. And the case (as far as it goes) is an authority for saying that if any peer be possessed of any number of titles, whether all from the same ancestor, or some from one ancestor and some from another ancestor, if the same limitation applies to all, and they will all be extinguished together, there is but one peerage, how many titles soever may adorn it.

But before quitting this part of the subject, I wish to call your Lordships' attention to another question, viz. in a case where the leading branch of a family has received a title of promotion added to more ancient honours, and the heirs of the branch so promoted fail, and the title of promotion ceasing, the ancient honours descend to a junior branch (now become the principal one), is the termination of the title of promotion to be considered the extinction of a peerage, or merely that the family has lost the promotion or advancement in the peerage? I own, my Lords, it appears to me that this loss by the family of the honour * conferred by the promotion is not an extinction of a peer- * 778 age. First, because the terms used in the fourth article irresistibly imply that a promotion is not a new creation. Secondly, because if all the titles in the same individual having the same limitations constitute but one peerage (a doctrine which is, I think, established by long and frequent usage); then if that peerage continues and descends to another branch of the family with some of the titles, there is no failure of a peerage nor of any thing but the mere title of promotion, which has already been shown to have been considered not to be a new creation. But, thirdly, I am of that opinion, because the practice since the Union has been in accordance with this view of the subject.

The return, certified to be correct by the Ulster King of Arms, give a very meagre account of what has occurred with reference to the peerages named in the statement. I beg to call your Lordships' attention more in detail to what belongs to those peerages.

The case of the late Earl of Clermont, who was created Baron Clermont in 1770, Viscount and Baron Clermont in 1776, with remainder to his brother, and in 1778, Earl of Clermont, but without any remainder to his brother, is one which I shall have occasion to advert to as an authority on the question immediately before your Lordships.

I pass therefore to the case of John Crosbie, second Earl of Glandore, and third Baron Brandon, whose father had been pro-

moted to an earldom. He died in 1815 (above forty years ago). It was not then, nor has it yet, been considered that a peerage became extinct because the peerage continued in the heir of the more ancient title, the barony of Brandon created in 1758.

The same view obtained when the fourth Earl of Massarene died without issue in 1816, and the earldom created in 1756 (by *779 the promotion in the peerage of the fifth * viscount) ceased.

The termination of the earldom was not considered as the extinction of a peerage, but merely the cesser of the title of promotion, because the ancient viscounty and barony created in 1600, with remainder to the heirs general, devolved upon his daughter. In this case, a promotion with remainder to the heirs male of the body (the original peerage being to the heirs general) was not considered as creating a new peerage, although the title of promotion had not the same limitation as the original creation.

So when John James second Earl of Farnham died without issue in 1823, it was considered that no peerage became extinct, because although the honours of promotion were lost to the family, the ancient barony devolved upon the heir of John Maxwell created Baron Farnham in 1756.

The case of the extinction of the viscounty of Oxmantown is peculiar. Lawrence Parsons was raised to the peerage as Baron Oxmantown, remainder to the heirs male of his body, remainder to his nephew Sir Lawrence Parsons and the heirs male of his body. In 1795 he was promoted to be Viscount Oxmantown, remainder to the heirs male, &c., but without the remainder to his nephew. In 1806, after the Union, he was promoted and became Earl of Rosse, with remainder to the heirs male, &c., remainder to the nephew and the heirs male of his body. He died in 1807, and the viscounty expired. But as the earldom, created since the Union, and the barony, created before the Union, continued in the person of Sir Lawrence the nephew, this was not dealt with as the extinction of a peerage.

On the other hand, I think it must be conceded that where there are two titles, one of which would go to the heirs general, *780 and the other to the heirs male, so that the * daughter of the eldest son might (on the failure of his male issue) obtain the one, and the son of the second son obtain the other, these titles must for some purposes be considered as representing distinct peerages until they unite in the same person. But as to these, no

case has occurred since the Union, except that of Massarene, already referred to, from which it must be inferred, as far as the practice is an authority, that if both the titles failed together in the same person, it would be the extinction of one peerage only.

The present case before your Lordships differs in some respects from any that I have hitherto noticed. It is the case of an inferior title conferred with remainder to the heirs male of the body of the first peer, and with a further remainder over to a distant relative and the heirs male of his body. It seems to me impossible to deny that if there existed at that time a collateral heir to the earldom of Mountrath, so that on the death of Charles Henry Coote, the seventh earl, without heirs male of his body, the earldom could have devolved to some heir male of the blood of Sir Charles Coote, the first earl, created in 1660, and the new barony would go to Charles Henry Coote, according to the limitation of the patent of the 20th of July, 1800, there would be a new peerage, because there would or might be two peers; and this view was taken in the Norbury case. But I have no doubt it was well ascertained, before the letters patent of the 31st of July, 1800, were granted, that there was no heir to the earldom, and would be none except of the body of the earl himself, of which there was no prospect or probability. And for this very reason, the patent of the 31st of July, 1800, gave a barony to him, remainder to the heirs male of his body, remainder to Charles Henry Coote, and the heirs male of his body. Now was this more than one peerage? If a new title of *promotion would not be a new peerage, why should the *781 grant of an inferior title create a new peerage? and why should the extended limitation to Charles Henry Coote, after his own heirs male of the body, make any difference?

The authority arising from the practice is not confined to the case now before your Lordships. The Earl of Mountrath died in 1802, less than two years after the Union. The barony of Castlecoote continued to his relative, whose son dying without issue in July, 1822, it was considered that one peerage became extinct, and one only; but the death of the earl, *sine prole*, he being succeeded as to the barony by his kinsman, was not for half a century deemed to be the extinction of a peerage.

The case of the barony of Cremorne is directly in point. Thomas Dawson was created Baron Dartrey in 1770, and Viscount Cremorne in 1785; but having no male issue, he obtained in 1797 a

patent creating him Baron Cremorne, remainder to the heirs male of his body; remainder to his nephew, Richard Dawson, and his heirs male. He died March, 1813, when the titles of Baron Dartrey and Viscount Cremorne became extinct; but the peerage continued in the person of the heir in remainder to the barony of Cremorne; and for forty-three years it has not been suggested that the cesser of the title of Baron Dartrey or of Viscount Cremorne was the extinction of two peerages, or even of one peerage. The ground of this must have been, that the viscount, with three titles, had but one peerage, and that on his death that peerage continued in his kinsman, although one of his titles had a different limitation. This case cannot be distinguished from that now under consideration.

But there is another case, not precisely the same in circumstances, but not differing in principle. The Earl of Clermont, who died in 1806, was Baron Clermont, so * 782 created in 1770, with remainder to the heirs male of his body, but no further remainder. In 1776 he was created Viscount and Baron Clermont, with a further remainder to his brother; and in 1778 he was promoted to an earldom, but without the remainder to his brother. The only difference between that case and the present case is, that the title with the extended limitation was higher than one title, and lower in dignity than another. Yet it seems to have been considered that he had but one peerage, and as that continued in his relative who took the viscounty and barony of 1776, but not the barony of 1770, or the earldom of 1778, there was no extinction of a peerage till the failure of the prolonged limitation.

With respect to the Norbury peerage, it must, I think, be admitted that the advisers of the Crown thought that the creation of a new and different remainder was the creation of a new peerage. And, therefore, it may be argued that the extinction of a new and different remainder would be the extinction of a peerage. But that would, I think, depend on whether the titles continued in different persons, or whether the new peerage merged by the titles all coming to the same person. But, my Lords, it may be doubted whether the Crown was correctly advised in the Norbury case. The Act of Union reserves to the Crown two privileges only, viz. first, the right to promote a peer (which must, I think, be understood to mean not merely the individual peer, but those in suc-

cession to the title after him) ; and, secondly, the right to create a peer. The Norbury case was a promotion, with a new and different remainder to the title of promotion. It may be doubted whether the Act of Union gives any power or authority to the Crown to do such an act. As far as the second son was concerned, this was a peerage in remainder, which alone, and apart from any other creation, the Crown could not create.

* The power is to create one other peer. Lord Norbury *783 was already a peer, and the son was not created a peer, but merely put into the remainder. No doubt it was competent to the Crown to promote Lord Norbury, and to create the second son a peer. And what was actually done was thought to be equivalent, and therefore to require that three peerages should be extinct before the patent was granted, which combined a promotion of the existing peer with a remainder, creating a new peerage in future, inasmuch as it was not limited to the heirs male of the body of the peer, but to the second son, and the heirs male of his body.

But, my Lords, it is time to advert more generally to the clause in the fourth article, in order to ascertain what is meant by a "peerage," as used in that clause, a word not of a distinct and definite meaning, but which may be used in several senses. I do not think (what may be called) a technical view of the question will much assist in the solution of it. If every patent, which, standing alone, would give a right to sit in the House of Peers, is to be considered as creating a separate and distinct "dignity of a peer," and this dignity so created is to receive the same consideration as an estate in land, then, indeed, every peer possesses as many peerages as he enjoys titles. This is, no doubt, the technical view of the subject. But it goes much beyond what any one would (as I imagine) contend for. And, therefore, I think no technical reasoning will afford a solution of the question, which demands larger views and a sounder logic than what belongs to the mere mootings and subtleties of Westminster Hall, and is rather fit for the sagacity of a statesman than the ingenuity of a lawyer. And it appears to me that this technical view is opposed to the general sense of the clause, and arises out of a mistake as to the meaning of the word "peerage," and an assumption *not *784 supported by any authority, that every distinct title is also a distinct "peerage." I apprehend the word is used in this clause (where it does not refer to the peers as a body) in the same sense

as the expression "dignity of a peer," which occurs so frequently in the report of a committee of your Lordships' House, dated 25th May, 1820. It expresses the status of a nobleman as a member of the British community, and not an imaginary tenement, the creature of an artificial system of law. A peerage is that which constitutes an individual a peer of the realm. He may have many titles, but he can be but one peer, and in this view can have but one peerage.

The language of the Act is, "upon the extinction of three peerages it shall be lawful for his Majesty to create one peer." The three peerages extinct are put in opposition to the one peer in the same terms as the extinction of one peerage is put in opposition to the creation of one peer, when the number of peers shall be reduced to one hundred. And the question is, does this mean that when the peerage (that is, the body of peers) is diminished by three, the power shall arise to add one to the diminished number? or does it mean that the Crown shall have that power, when there shall be a cesser of three titles, possibly without any diminution of the number of the peers at all? The declaration at the end of the clause as to the true intent and meaning of the article, that it should be lawful for the Crown to keep up the peerage of Ireland to the number of one hundred, shows that throughout, the number of peers, as individuals, is what is meant and referred to, and not the number of titles they may enjoy.

It appears to me, therefore, that the question proposed by your Lordships must be answered in the negative.

I have presented to your Lordships what has occurred to
 * 785 me upon the question submitted to the Judges. But, * my

Lords, I distrust my own judgment and opinion, partly because it does not agree with the views of some of my brethren, for whose judgment (not in matters of law only) I entertain an unbounded and most sincere respect; partly also, because the subject is one on which it is impossible to arrive at certainty. Even the purest sciences, which live in definition only, are scarcely free from doubt, but the moment they are applied to the external world, differences arise between the most eminent and the most candid philosophers. Few are the subjects on which it is permitted to human nature to dogmatize, and when disputes arise upon the application of the principles of justice (supposed to be unerring and eternal), as soon as they are applied to the varied business

of life, it cannot be matter of wonder that there should not be a uniformity of judgment upon the mere construction of an Act of Parliament not very skilfully drawn, introducing a new power in the Crown under new circumstances, and fettered by conditions altogether without precedent, considerations which I own, my Lords, induce me to take refuge from doubt and distrust in the practice of half a century, acquiesced in and followed under every shade of administration, and which remained unshaken and undisturbed during a very stormy period of our history.

But chiefly, my Lords, I must abstain from delivering my opinion with too much confidence, because I hold it to be essential to the right construction of an Act of Parliament that they who are called upon to expound it should at least be competent Judges of the subject to which it relates. Long ago Lord Coke laid it down, "that it did not belong to the Judges to judge of any law, custom, or privilege of Parliament." And your Lordships have very lately acted upon that maxim. How shall the Judges assist your Lordships as to the construction of an Act *relating to the *786 dignity of a peer, or the effect of the statute upon the peerage, if they are incompetent to advise your Lordships in any matter relating to the peerage itself? Conscious of our incapacity and incompetence to deal with these matters apart from the statute, it is only with the humblest diffidence that I offer any opinion upon the construction of the statute itself. There is, however, one matter which is free from all doubt, and that is the exposition which the statute has received in the construction put upon it by a practice of half a century.

The opinions of the Judges were ordered to be printed, and the committee adjourned.

June 30.

THE LORD CHANCELLOR. — The duty which I have to perform in this case I shall perform very shortly. This question arises upon a petition presented by a gentleman calling himself Lord Fermoy, and claiming a right to vote at the election of representative peers of Ireland; and it was referred to the Committee for Privileges to inquire whether he had made out his right so to vote, the question being whether his creation was a valid creation. That depended upon this short matter. There were undoubtedly two vacancies

of Irish peerages, and the question was, whether there were three vacancies ; the Act of Union requiring that three Irish peerages shall become extinct before the Crown is entitled to create a new one. And it turned upon this, whether according to the true construction of the Act of Union, the peerage of the earldom of Mountrath had become an extinct peerage or not.

It appeared that the title of the Earl of Mountrath was an ancient Irish title, and that shortly before the Union the then holder of that title was created a baron, by the title *787 *of Baron Castlecoote, to him and the heirs male of his body, with remainder over to a collateral relation and the heirs male of his body. That was the state of things at the time of the Union. Shortly after the Union, in the year 1802, Lord Mountrath died without issue male ; and consequently, no doubt, there would have been such an extinction of an Irish peerage as the Act requires, had it not been for the fact that upon his death another title which he possessed, namely, that of Baron Castlecoote, did not become extinct, but went over by virtue of the terms of the special limitation to a collateral relation, who then became Lord Castlecoote. The question therefore was, whether that which was in strict language the extinction of a peerage, together with the other two which were certainly vacant, was sufficient to entitle the Crown to create this gentleman Lord Fermoy.

My Lords, I confess I think it a matter of considerable doubt ; I cannot say that all my doubts are even now entirely removed. Perhaps it may be a natural incident to the infirmity of the human mind, that where one has formed an opinion it may be difficult entirely to shake it off. Not, I protest, that I ever formed an opinion very strongly upon the question ; but undoubtedly if we had to consider the matter solely by the first part of the article in the Act of Union, there can be no question that a peerage was extinct, but, reading the whole section together, the enactment gives rise to the question, whether or not, although this peerage was extinct, it was an extinct peerage within the meaning of that clause.

Now I am not intending at all to keep up any dissension, or to raise any doubt about it ; I would only put this point to your

Lordships. Suppose that just previously to the Act of *788 Union there was a person who inherited a peerage *from

his ancestors, and who was an earl or a baron by descent from his father, and suppose he had a younger brother who was also before the Union created a peer, and *rebus sic stantibus* the Act of Union is passed. Now, if the younger brother, who had been so created a peer, had died without issue, there is no doubt there would have been one peerage extinct. And when the elder brother afterwards died without issue, there would be no doubt that two peerages would then have become extinct. If, on the other hand, the elder brother had died first, then, according to the construction put upon the Act of Union by the majority of the learned Judges, there would have been no peerage then extinct, because that peerage would then have gone to his younger brother, and when the younger brother died, the result, according to the interpretation which the learned Judges have put upon the Act, would be, that one peerage only became extinct. I confess it does appear to me a strange thing that the accident of the order in which two people die should decide the point whether one peerage or two peerages have become extinct. However, nobody can dispute that the Act is extremely loosely worded, and I am perfectly ready to admit that I think expediency is very much in favour of the view of those who say that there were not three vacancies at the time of this creation, because, unquestionably, it is much in consonance with the evident object of the statute that a peerage should only become extinct when the peer and the peerage both ceased together. That is the view of a very large majority of the learned Judges, who have gone into this case very attentively, and that majority being very decided, and very strong against the view that I have propounded, namely, that there was an extinction of a peerage by the death without issue of the Earl of Mountrath, I am * prepared to recommend your Lordships to adopt *789 that view, and to declare that there were only two peerages vacant, and that consequently there was no power in the Crown to create the barony of Fermoy. I therefore move that the petitioner has not made out his claim to vote as one of the representative peers of Ireland.

THE EARL OF DERBY. — My Lords, as I was the person who first brought this subject under the notice of your Lordships' House, and moved that it should be referred to the Committee for Privileges, I may be perhaps as much prejudiced in favour of the view

which I have taken of the case, and perhaps even more so, than the noble and learned Lord has confessed himself to be. But I must say, having listened most attentively to the arguments of the learned counsel on both sides, and also to the very learned and carefully drawn opinions of the learned Judges, the question appears to me perfectly free from doubt. For I go further than the noble and learned Lord, and say that even setting aside altogether the questions of expediency and of contemporaneous exposition of the law, and the universal practice prevailing from the year 1802, and the fact that this question was virtually decided by the non-creation of another peer within a few years after the Act of Union, when all the parties to the Act of Union must have perfectly well known what was the intention of it, and setting aside the last clause of the fourth article of the Act, which, in my mind, throws a very clear and distinct light upon the first part, I cannot even then go so far as to say that I think that the first clause of the Act would bear the interpretation which it appears to the noble

and learned Lord that it might bear, because I cannot help
 * 790 * thinking it incorrect to say that by the death of the Earl of Mountrath a peerage was extinct. By the death of the Earl of Mountrath there is no doubt that a title was extinct, but although there may be several titles, yet all those titles confer but one peerage. Some of the learned Judges have given a meaning to the word "peerage" which puts the different parts of this Act in perfect unison together, namely, that, "peerage" was the status and condition of a peer, and that although one peer might hold together many titles, yet that he had by virtue of his titles but one peerage; and that, consequently, so long as one of those titles remained in him or his descendants, there was not an extinction of a peerage, although the peerage was robbed of one, two, or three of the titles appertaining to it. I think, my Lords, that that is the fair and reasonable construction of the word "peerage." It is used undoubtedly in another sense in another part of this Act. It is used in a somewhat loose way in speaking of the whole peerage of Ireland, meaning the whole collective body of peers. But, as applied to extinctions, it clearly does not refer to each separate title (which is the effect of the argument in support of the claim, although a separate title is not a separate peerage), but to a reduction in point of number of those who enjoy the status and condition of a peer. In this sense there was no diminution in the

number of peers by the death of the Earl of Mountrath, and in that sense the Act appears to have been invariably construed from the period of the Union down to the present time. Of course it is a great satisfaction to me, who brought this matter to your Lordships' notice, to find that the opinion which I had humbly entertained is supported by a very large majority of the learned Judges. Though no doubt the two dissenting Judges are men of very distinguished eminence * and ability, yet the preponderance of opinion is so strong on the other side, that I think your Lordships can hardly be in error in agreeing to the motion which has now been made by the noble and learned Lord.

LORD CAMPBELL. — My Lords, it gives me most sincere satisfaction to find that my noble and learned friend, the Lord Chancellor, has moved this resolution. This appears to me as plain a question as I have ever had to consider since I have had the honour to act in a judicial capacity. I cannot entertain any doubt that the intention of the Legislature, as expressed in the Act of Parliament, was that there should not be a power in the Crown to create a new peer of Ireland unless the number was diminished by three. You are not to look at dignities, but it is to be decided *per capita*. Was the number of peers diminished by the extinction? It seems to me quite clear that it was the intention of the Legislature, as expressed in the Act of Union, that when the number of Irish peers was diminished by three, and only then, there should be a power to create a new peerage until the number was reduced to one hundred, and that after the number was reduced to one hundred, then *toties quoties*, as often as that number was lessened by one, vacancies should be filled up, so that the number of one hundred should be maintained. That intention is clearly and manifestly declared in the Act of Parliament. The words of the Act clearly indicate that intention. Looking at the first part of the article in question, the meaning of "peerage" may well be the status of a peer; and looking no further, it might be fairly construed to mean that it is necessary that the number of peers should be lessened by three before a new peer can be created. But when you come to the latter part of the article respecting the one hundred peers, all doubt is removed. Therefore we must * conclude that it is used in the same sense in *792 both parts of the article. And that shows that the power

of the Crown to create a new peer of Ireland only applies when the number is diminished by three, when there are three peerages in that sense of the word extinct.

The committee resolved, that the petitioner had not made out his claim to vote for representative peers of Ireland.

THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY v. THE
EAST LANCASHIRE RAILWAY COMPANY.

1856. June 27, 30; July 1.

The LANCASHIRE AND YORKSHIRE RAILWAY } *Plaintiffs in error.*
COMPANY, }
The EAST LANCASHIRE RAILWAY COMPANY, *Defendants in error.*

Agreement. Railway Tolls.

Railway company A. agreed with railway company B., that in consideration of being allowed to use a part of B. line, the traffic on the part so used should be paid for according to a certain definite rate of toll which was reduced below the ordinary amount. A. was afterwards amalgamated with other lines which had been made since the agreement was entered into, and its own amount of traffic was increased not only by those new lines, but by their bringing it into communication with some of the chief lines of the country. B. had also been amalgamated with other newly created lines. In both instances, the amalgamating acts had preserved all the "rights, powers, &c." of the original lines :—

Held, that not only all the traffic which passed over line A. having originated there, but all that which came on line A. having originated elsewhere, might pass, on payment of the reduced rate of toll, over the part of the line B. which was the subject of the original agreement.

There were however cases in which company A. might deprive itself of the benefit of this agreement, as for instance, if company A. should, in consideration of any particular benefit or service to itself, grant to any one a free passage along the whole distance (including therefore the particular part of the line B., the subject of the agreement), in which case B. might claim payment independently of the agreement.

* 798 * THIS was an action of debt, brought to recover monies claimed by the plaintiffs (now plaintiffs in error), as due to them from the defendants (now defendants in error), for tolls and duties payable in respect of the passage of carriages, passen-

gers, and goods over the plaintiffs' railway. The defendants pleaded payment into Court of 845*l.* 2*s.* 9*d.*, and never indebted and payment as to the residue of the plaintiffs' claim. The plaintiffs accepted the money paid into Court, and took issue on the other pleas. At the Liverpool summer assizes, 1849, a special verdict was found, which set forth the following facts:—

The plaintiffs' railway was originally known as "The Manchester and Leeds Railway," and, under different Acts of Parliament, by various amalgamations with other railway companies, amongst them, with the Manchester, Bolton, and Bury Canal and Railway Company, became and obtained the name of "The Lancashire and Yorkshire Railway."

The defendants' railway originated in a certain small line of fourteen miles in length, called "The Manchester, Bury, and Rossendale Railway," which was afterwards, by virtue of various extensions and amalgamations, under different Acts of Parliament, increased to a length of seventy-two miles, and then obtained the name of "The East Lancashire Railway."

On the 14th November, 1843, an agreement was entered into between H. J. R. Barnes, on the part of the proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, and John Grundy, on the part of the proprietors of a projected railway company, to be called the Manchester, Bury, and Rossendale Railway Company. By the second section of this agreement, the projected company was to have the use of the station at Salford, belonging to the Manchester and Bolton Company, but not so as to *impede the traffic of the latter, on making a *794 certain payment to be settled by three referees.

The third section was as follows:—

"That the traffic of the Manchester, Bury, and Rossendale Railway Company (that is, traffic using both lines or any portions thereof between Salford and Rawtenstall, or any parts intermediate to these), shall be carried on as it respects engine power and carriages, clerks, porters, and all other expenses, except the maintenance of the Manchester and Bolton Railway, at the costs and charges of the Bury and Rossendale Railway Company, who shall pay to the Manchester and Bolton Railway Company, for the use of the railway, and in respect of the traffic herein specified, a *pro rata* proportion, according to the distance passed over the two lines respectively, of all and singular the gross rates, tolls, and

proceeds arising from the said traffic, with no other deduction from the same than that hereafter mentioned; and with this proviso, that nothing herein contained, nor elsewhere provided, shall authorise the Manchester and Bolton Railway Company to receive for the use of their railway, being the point of junction of it with the Bury and Rossendale Railway, at Salford, for a greater distance than half the length between such point of junction and the terminus of the Manchester and Bolton Railway, in Salford; nevertheless, the Manchester and Bolton Railway Company shall be entitled to charge for the use of such portion of their railway, for a length of two miles at the least." And the fourth section provided for certain deductions from the gross traffic, before the apportionment mentioned in the third clause of the agreement should take place.

This agreement was confirmed and explained by another between the same parties, made on the 22d day of January, *795 *1844, by which the provisions of the previous deed were agreed to be embodied in any Act of Parliament for establishing the Manchester, Bury, and Rossendale Company.

The 7 & 8 Vict. c. 60, was the Act which incorporated the Manchester, Bury, and Rossendale Railway Company, with power to make a railway joining the Manchester and Bolton Railway, in the township of Clifton, and passing through Clifton and other places to Whalley, in the county of Lancaster. Certain portions of that Act, in effect, provided that after the junctions between the railway thereby authorised, and the Manchester, Bolton, and Bury Railway at Clifton, should have been effected, and the Manchester, Bury, and Rossendale Railway opened to Bury for passengers' traffic, the Manchester, Bury, and Rossendale Railway Company should at all times be entitled to use so much of the Manchester, Bolton, and Bury Railway as lay between the point of junction at Clifton and the then Salford terminus of the last-mentioned railway, with their own engines, carriages, &c. for the conveyance of all such passengers, cattle, goods, &c. of every description, and of such only as should have first *bond fide* passed along the railway by that Act authorised to be made from, or should afterwards *bond fide* pass along the same railway to, any of the usual stations or stopping places thereon, subject only to the payment of such toll, and to such deductions and regulations as might previously have been or might thereafter be determined upon by mutual agree-

ment between the two companies. And also for the purposes of such traffic, and such only, to use the station at Salford. And then further provisions were made with reference to the use of the before-mentioned station at Salford, in case of additional accommodation being required by the Manchester, Bury, and Rossendale Company. The railway so authorised, and called the Manchester, Bury, and Rossendale, was * afterwards constructed, * 796 commencing by a junction with the Manchester, Bolton, and Bury Railway, at Clifton.

The length of the Manchester, Bolton, and Bury Railway, from the station at Salford to such junction at Clifton, was four miles; the length of line authorised by the Statute of the 7 & 8 Vict. c. 60, being the Manchester, Bury, and Rossendale Railway, was fourteen miles, and the length of so much thereof as extended from the said point of junction to Bury was six miles, and no more.

By the 8 & 9 Vict. c. 35, called the East Lancashire Railway Act, 1845, an extension of the Manchester, Bury, and Rossendale was authorised to Accrington, Colne, and Blackburn, and upon the sale and purchase of the extension taking effect, the united undertaking was to be called "The East Lancashire Railway." A conveyance was duly executed under such power on the 4th day of August, 1845, whereby the two undertakings were united, and became the East Lancashire Railway Company.

An agreement was on the 19th day of March, 1846, entered into between the proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, thereafter called the Bolton Company, of the first part, the Manchester and Leeds Railway Company of the second part, and the East Lancashire Railway Company of the third part, and was sealed with the seals of the said three several companies, whereby it was (amongst other things) agreed that the East Lancashire Company's agreement of the 22d day of January, 1844, and the provisions of the Act of Parliament affecting the Bolton Company, as aforesaid, should be confirmed by the then pending Act, for the amalgamation of the Manchester and Leeds Railway Company, and the said company of proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway Company, or some other Act of Parliament, * subject to the provision that the East Lan- * 797 cashire Company, in respect of the traffic passing from the Manchester and Bolton line to the Victoria station, or elsewhere,

should be liable to pay to the Bolton Company, or to the company so to be amalgamated as aforesaid, for the use of the Manchester and Bolton line between Clifton and Salford, the same sums only by way of toll as were set forth in the agreement dated the 22d January, 1844; and provision was made for the use, by the East Lancashire Railway Company, of a certain then intended line and station called the Blackfriars line and station respectively (which were never constructed), and provisions were made for the arrangement, according to plans agreed on by certain engineers named in such agreement, of the passenger station and goods accommodation at Salford, with arrangements as to additional accommodation, subject to the provisions of the agreement of 22d January, 1844.

The Victoria station was a station belonging partly to the Manchester and Leeds Railway Company, and partly to the London and Northwestern Railway Company, and was connected with the Salford station of the Manchester, Bolton, and Bury Railway by a short branch of 1290 yards in length, whereby a communication was established between some of the lines of the Manchester and Leeds Railway Company, and that of the Manchester, Bolton, and Bury Canal Navigation and Railway. •

By an Act of the 9th and 10th years of the reign of her present Majesty, c. 378, the real and personal estate and effects, rights, privileges, powers, and authorities of the proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway were vested in the Manchester and Leeds Railway Company; and in that Act there was a proviso, that for passengers and goods, &c. passing less than six miles over the railways thereby amalgamated *798 including the Manchester, Bolton, and Bury * Railway, the Manchester and Leeds Railway Company might receive tolls as for six miles. And the agreements before set out of the 22d of January, 1844, and the 19th of March, 1846, except so far as they were inconsistent with the now reciting Act, were confirmed, and there was a clause saving all the rights of the East Lancashire Railway Company as to the use of the Manchester, Bolton, and Bury Railway, and the station at Salford, &c.

By an agreement of the 11th of January, 1848, made between the Lancashire and Yorkshire, late the Manchester and Leeds Railway, of the one part, and the East Lancashire Railway Company, provision was made for the expenditure necessary for provid-

ing the requisite additional station accommodation for goods and passengers at Salford, as under the former agreements, which additional station accommodation was afterwards provided, and 10,000*l.*, part of the cost, were advanced by the East Lancashire Railway, under conditions provided by this agreement.

Other Acts of Parliament, creating the Blackburn and Preston Railway Company, and the Liverpool, Ormskirk, and Preston Railway Company, and then amalgamating them with the East Lancashire Company, "with all the rights, powers, and authorities thereof," were then set forth.

By an Act of the 9 & 10 Vict. c. 276, powers were given to the East Lancashire Company to alter the line and level of its railway, and abandon a part of the extension lines; and this Act contained a proviso that nothing in it should alter, diminish, or prejudice any of the rights, privileges, powers or authorities vested in the Manchester and Leeds Railway Company, except so far as by the said Act altered or repealed.

Another Act, 10 & 11 Vict. c. 288, gave power to the East Lancashire Railway Company to purchase additional *ground for station, &c. accommodation; and by another *799 Act of the same year authority was given to extend the line into Preston, and to demand the same tolls as were authorised to be demanded by the East Lancashire Amalgamation Act, 1846.

The special verdict then found that by an Act of 9 & 10 Vict. c. 390, intituled, "An Act for making certain Railways in the West Riding of the County of York, to be called the West Riding Union Railways," certain persons were incorporated by the name of the West Riding Union Railways Company, and were authorised to make certain railways communicating with the Manchester and Leeds Railway, and to receive rates and toll for passengers and goods, with a proviso, that, with respect to the same passing over the said railways for a less distance than six miles, the said company thereby incorporated might receive toll as for six miles; and it was provided that after the amalgamation of the company thereby incorporated with the Manchester and Leeds Railway Company, the maximum rates of charge authorised by the West Riding Union Railways Act, for the conveyance of passengers, &c., including every item of charge except government duty, should be applicable to the Manchester and Leeds Railway, and to all other

railways before then or in that Session of Parliament amalgamated with the Manchester and Leeds Railway Company, but such provision not to allow the Manchester and Leeds Railway Company to charge any higher rate than previously authorised.

And by a further provision in this Act, the West Riding Union Railways were vested in the Manchester and Leeds Railway Company at the expiration of three months from the 18th day of August, 1846.

It was further found that the junction at Clifton, between * 800 * the Manchester, Bury, and Rossendale Railway, and the Manchester, Bolton, and Bury Railway, was effected, and the Manchester, Bury, and Rossendale line opened for traffic to Bury and elsewhere, and that that company, afterwards the East Lancashire Railway Company, at all times used so much of the Manchester and Bolton Railway as lies between Clifton and Salford station, and that between Clifton and Salford there were two intermediate stations, called Pendleton and Winsor Bridge. And that between the 29th April, 1849, and the 1st June, 1849, carriages, &c. of the East Lancashire Railway Company, with passengers, goods, &c., passed over the Manchester and Bolton Railway between Clifton junction and Salford, and that some of such traffic came from, and other part passed to, stations and places beyond the portion of defendant's railway which formed the original Manchester, Bury, and Rossendale line.

Upon the facts set out in such special verdict, three questions arose : —

1. Upon what principle the reduced toll agreed by both parties to be payable in respect of the traffic of the original Manchester, Bury, and Rossendale Railway ought to be calculated.

The Lancashire and Yorkshire Company contended that the distance of four miles between Clifton junction and Salford was intended by such agreement to be treated as two miles, for the purpose of ascertaining the distance travelled by the Manchester, Bury, and Rossendale traffic, as well as for the purpose of charging for the same, the two miles mentioned in the agreements being treated as a conventional distance to be dealt with in all cases in lieu of the actual distance of four miles ; while the East Lancashire Company contended that such distance was to be * 801 treated * as four miles (its actual length), in ascertain-

ing the distance travelled, and as two miles in estimating the charge.¹

2. The Lancashire and Yorkshire Company also contended that the reduced rate in question, however calculated, only applied to the traffic of the original Manchester, Bury, and Rossendale line, and not to its branches, extensions, or lines amalgamated therewith.

3. The same company, thirdly, contended that, as to traffic passing from the junction at Clifton to Salford, or the contrary way, arising from or passing to places or stations beyond the original Manchester, Bury, and Rossendale Railway, the East Lancashire Company's traffic was in the same situation as that of other railways and the public, and was liable to the clause in the Lancashire and Yorkshire Act, the 9 & 10 Vict. c. 378, § 12, allowing them to charge the rates as thereby reduced (and which were further reduced by the West Riding Union Railways Act, 1846), as for six miles for less distances travelled over their line of railway.

The Court of Exchequer gave judgment, that the Lancashire and Yorkshire Company's principle of calculations was not correct, and that the reduced toll did not apply to the extended lines of the Manchester, Bury, and Rossendale Railway, but that the six-mile clause was applicable; and judgment was accordingly entered for the plaintiffs for *382*l.* 11*s.* 2*d.*² A writ of error *802 was brought upon this judgment in the Exchequer Chamber, and that Court held that the plaintiff's principle was not correct, and that the reduced rate applied to the extended lines; and the judgment of the Court of Exchequer was accordingly reversed, and judgment entered for the defendants.³

The present writ of error was then brought.

The Judges were summoned, and Mr. Baron Alderson, Mr.

¹ For example, if traffic passed from Salford station to Bury, a distance of ten miles, that is, six miles from Bury to Clifton junction, and four miles thence to Salford, and the toll in respect thereof was 10*d.*; according to the Lancashire and Yorkshire Company's argument, the proportion of toll payable to them would be as 2 to 8, or 2½*d.*; while, according to the East Lancashire Company's argument, the proportion would be as 2 to 10, or 2*d.*, the difference arising from the former company calculating the distance from Salford to Clifton as two miles, while the latter treated it as four miles. This point was not argued in the present appeal.

² 7 Exch. 126.

³ 9 Exch. 591.

Justice Coleridge, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crowder, Mr. Justice Willes, and Mr. Baron Bramwell attended.

Mr. Atherton and *Mr. Tomlinson* (*Mr. Spinks* was with them) for the plaintiffs in error. — Though at the moment of entering into the contract of November, 1843, it might probably have been expected that new lines of railway would be created immediately adjoining those which were then in existence, and were the subjects of the agreement, still, the arrangements and stipulations then made were intended to be strictly confined to the existing lines and stations. The companies which formed the lines afterwards amalgamated were not in any way parties to this agreement, and cannot be benefited by it. This agreement must be looked at with reference to the 1 & 2 Wm. 4, c. 60, when it will clearly appear that the journey must be a journey to or from some stipulated places on the line. Of course, therefore, places on lines not then made, nor even projected, cannot be included in it. Nor did any of the subsequent Acts declare that they should be included. Nor could it refer to traffic coming from a line which belonged, like the Northwestern, to neither of the contracting parties. The * 803 appellants' line terminates at * the Salford station; at the Victoria station the line of the Northwestern Company terminates; so that traffic might come up that line from beyond that station, and then go on to Bury. Such traffic was not intended to be included in the agreement; for that would have been to agree that all the Northwestern traffic which happened to pass along a part of the East Lancashire line should, because it had so passed, pay a smaller toll to the Lancashire and Yorkshire line, when brought upon that line. In that way every railway company in the kingdom might be benefited at the expense of the Lancashire and Yorkshire Company. Such a result was not contemplated, and the construction of the agreement that would produce it cannot be supported.

If all the traffic not merely originating on the Manchester and Rossendale line, and carried along it, but coming to it from any other line or lines, may be carried along the Lancashire and Yorkshire line at a reduced rate, it will be impossible to make a correct calculation of the tolls to be paid. For coming from other lines, there will have been paid for such goods, or passengers, a gross

sum, which must include the toll in respect of the line where the traffic originates, the tolls due for passing along the East Lancashire line, and a proportionate sum for the Lancashire and Yorkshire Railway, along which the traffic has really passed. That sum can never be correctly ascertained; and the inability to ascertain it is a strong argument to show that it never could have been the intention of the parties to enter into a contract where such a difficulty must inevitably arise.

Mr. H. Hill (*Mr. J. Henderson* was with him) for the defendants in error. — The contract here was very beneficial to the appellants, as it preserved to them a part of the profits of the Bury * Canal navigation, which would have been entirely * 804 lost to them if a railway there had been made by any persons with whom they had no contract. That was, in truth, a great purpose of this agreement, and formed a good consideration for what was then agreed to. The Court below recognised this state of things.¹ The cases of *Dand v. Kingscote*,² and *Bishop v. North*,³ show that the principle now contended for by the defendants in error is applicable to cases like the present. The real meaning of the parties was this: that the traffic to be operated on by this agreement must be that which *bonâ fide* passed along the Bury and Rossendale Railway, but it was not confined to that which only originated on that railway. And there is nothing in any of the Acts of Parliament to limit this right.

[THE LORD CHANCELLOR. — Suppose the Rossendale Company had set up an omnibus, and given notice that any one should be taken in it as a passenger for a certain sum, say 10s., to what proportion of that charge would the Rossendale Company be absolutely entitled?]

To a mileage rate. There would be no difficulty in making the calculation, the moment the rule as to the construction of this agreement on which it must be made had been fixed.

He was stopped.

Mr. Atherton, in reply. — The traffic to be the subject of this agreement was that of the Bury and Rossendale Railway, and of that alone. It never was meant, in giving to one party the benefit

¹ 9 Exch. 598.

² 11 M. & W. 418.

³ 6 M. & W. 174.

of his own traffic over the line of the other party that that
 * 805 other should be made to suffer a general competition * on
 his own line from traffic brought from other lines, beyond
 and independent of that of his co-contractor. Yet such must be
 the result if the agreement of the other side is to prevail; and
 when general traffic is thus brought on the line, it will be im-
 possible properly to calculate the proportions of the payments.

THE LORD CHANCELLOR, after stating the nature of the question,
 said, that he had received an intimation from the learned Judges
 that they had formed a very strong opinion on the question whether
 the judgment of the Court below was correct, so strong that he
 had interrupted Mr. Hill when he was addressing the House for
 the defendants in error. If upon further reflection they should
 alter that opinion, the case must be fully heard out. But at
 present what he proposed to do was to ask the learned Judges
 whether they all agreed in one opinion, and were now prepared to
 state it.

MR. BARON ALDERSON intimated that they did agree in opinion,
 but he requested time to put it into form.

July 1.

MR. BARON ALDERSON. — My Lords, her Majesty's Judges have
 taken into consideration the arguments which have been urged in
 this case, and we have all come to the conclusion that the decision
 of the Exchequer Chamber was right. The question shortly is,
 what was the extent of the agreement made between the Man-
 chester and Bolton Railway Company and the Bury and Rossen-
 dale Railway Company. And this mainly depends on the third
 clause of the agreement, signed by Messrs. Barnes &
 * 806 Grundy, and * dated 14th November, 1843, by which it was
 agreed. [His Lordship read it.]¹

Now this provides for the use of the four miles of the Man-
 chester and Bolton Railway (viz. from Clifton to Salford), as a
 part of the Bury and Rossendale Railway, but restrains that use
 to those purposes alone where both lines are used, so as to prevent
 the user of that part of the Manchester and Bolton Railway by
 the Bury and Rossendale Railway Company in competition with

¹ Ante, p. 793 et seq.

them, and to this privilege is added that of the use of the station at Salford, in subordination however to the Manchester and Bolton Company by the Bury and Rossendale Company. The terms on which these privileges are granted are the payment to the Manchester and Bolton Company of a *pro rata* proportion of the proceeds of this traffic, according to the distance passed over the two lines respectively by the Bury and Rossendale Company.

At the time of this agreement, there were no other lines of railway running into the Bury and Rossendale Railway. The Court of Exchequer held that the agreement was limited to the traffic originating and then travelling, or about to travel on the Bury and Rossendale Railway alone. The Judges of that Court were mainly induced to arrive at that conclusion, by the circumstance that the contract provided only for a limited amount of accommodation at the Salford station. But on adverting to the terms of the agreement, we think this was not well founded, for the agreement in the second article had provided that the Bury and Rossendale Company was to pay for any additional accommodation to the station arising from the traffic of the Bury and Rossendale Company, as arbitrators * might determine. And by the * 807 facts subsequently added to the special verdict, it appears that further arrangements were afterwards made, and a power of erecting additional buildings given to that company, then called the East Lancashire Company, for the purpose of accommodating the traffic, then and since called the East Lancashire traffic.

We think, therefore, that the agreement cannot be restricted by the supposed limitation arising out of the size of the Salford station, and that the parties did not contemplate any thing short of accommodating at that station, in its then or extended state, any thing less than the whole traffic which might come from any quarter to, and be brought in any mode of conveyance to, and then carried along the Bury and Rossendale Railway. Now this would reasonably include any new road or canal or railway. The limit would be, what traffic could be accommodated and enabled safely to pass along the Bury and Rossendale Railway. All such traffic having so passed along between Rawtenstall and Clifton was to be allowed to pass on under the agreement between Clifton and Salford.

It was suggested that there might be a difficulty in some cases in calculating the amount of the *pro rata* payment, as if goods

were brought from a distance for a gross sum to Manchester, to be carried on by the Bury and Rossendale Railway Company, without a distinct separation of the sums paid for bringing them to that railway and carrying them on ; but no such difficulty occurs in the present case, or indeed is likely to occur in future.

We think, therefore, that all traffic brought by any other line to the railway between Rawtenstall and Clifton is part of the traffic of the Bury and Rossendale Railway ; that if it passes over
 * 808 that railway and arrives at Clifton, it is * entitled to go forward to Salford, under the conditions of this agreement, and that therefore the judgment of the Court of Exchequer Chamber is right.

THE LORD CHANCELLOR. — My Lords, this case having been argued partly on Friday and then again yesterday, the learned Judges have now delivered their unanimous opinion, that the judgment of the Court below was perfectly right.

Concurring as I do in that opinion, it being one, indeed, which I had myself strongly formed during the progress of the argument, I do not know that I need do more than simply tender my advice to your Lordships at once to affirm the judgment of the Court below. It is hardly necessary that I should add any thing to the reasons so ably and clearly stated in the opinion just delivered by Mr. Baron Alderson on behalf of himself and the other Judges. The only observation I would make is this : there was in the course of the argument one difficulty which presented itself to my mind, and one only ; it was glanced at in the latter part of the opinion of the learned Judges. It was this : cases possibly might arise in which there would be very great difficulty in saying how much of any gross sum that was to be paid to the East Lancashire Railway Company, in respect of the traffic of particular passengers or goods, was attributable to that part of the journey which related to passing over the line of the Lancashire and Yorkshire Railway Company. Suppose a passenger to come from a great distance, say from Edinburgh, and to go to Manchester, he pays a gross sum of money ; it might be that there would be a difficulty in saying how much of that gross sum was to be attributed to his passing over the East Lancashire Railway. It is essential, for the
 * 809 purpose * of carrying into effect the contract in question, that that should be capable of being ascertained, and inas-

much as cases might arise in which it would be difficult, if not impossible, it occurred to me that that might occasion some obstacle in this construction of the contract. But the solution that I have given in my own mind to that difficulty is quite satisfactory, as far as I am concerned. It is this: although I entirely concur in the judgment of the Court below, I am not prepared to say that by special contract the East Lancashire Railway Company might not deprive themselves of the benefit of this contract which they have made with the Lancashire and Yorkshire Railway Company. Suppose, for instance, they were to stipulate that, for their own accommodation, a particular individual should come every morning, bringing the newspapers of the day from Manchester to Bury, or for any other purpose, and should therefore travel without paying any toll; it would be impossible to say what proportion of a sum should go to the plaintiffs' company, because there would be in that case nothing to pay. So, if instead of paying a sum of money some benefit is conferred upon the East Lancashire Railway by a particular individual, as, for instance, by his allowing the use of a house of his, or a field of his, and in consideration of that it is agreed that he shall be always allowed to travel toll free, how is that to be apportioned? In that case I think that this contract would not apply. That is the solution which I should give to a case of that sort. In an ordinary case, which is not only an ordinary case, but which would probably be the universal case, parties would always pay a certain amount of toll, and a proportion of that capable of easy calculation will be that which the company is to pay in respect of using the line. That being so, I entirely concur in the opinion which has *just been *810 delivered by the learned Judges, that it does not matter whether the traffic comes on to the line from Edinburgh, or starts at once from Rawtenstall; still, for whatever proportion it travels upon the line, it is traffic upon the line within the meaning of the contract. Therefore I humbly move your Lordships to affirm the judgment of the Court of Exchequer Chamber.

Judgment for the defendants in error.

1855. June 25; July 9. 1856. May 19; July 10.

ALEXANDER SCOTT, *Plaintiff in error.*

GEORGE AVERY, *Defendant in error.*

It is a principle of law, that parties cannot by contract oust the Courts of their jurisdiction; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant.¹

A. effected in a mutual insurance company a policy of insurance on ship, one of the conditions of which was, that the sum to be paid to any insurer for loss should in the first instance be ascertained by the committee; but if a difference should arise between the insurer and the committee "relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance," the difference was to be referred to arbitration, in a way pointed out in the conditions: "provided always, that no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy," until the matter has been decided by the arbitrators and "then only for such sum as the arbitrators shall award," and the obtaining the decision of the arbitrators was declared a condition precedent to the maintaining of an action:—

Held, that these conditions were lawful, and that (even should the difference relate to other matters than those of mere amount), till award made no action was maintainable.

ACTION on three policies of insurance effected on the ship "Alexander," valued at 2400*l.*, in three assurance companies, of which both the plaintiff and defendant were members. It will be sufficient to refer to the first only. The declaration, after stating in the usual form the making of the policy, alleged that it was mutually agreed that all rules and regulations of the association should be binding on the assurers and assured, as if they were inserted in the policy and formed part thereof, and that the said rules and regulations, so far as they relate to the plaintiff's claim,

are as follows: "That any member who shall prove to the committee of the said association that his ship is lost, * will be entitled (at the expiration of two months from the date of the first quarterly settlement) to part payment for the same, but in no case to exceed 80*l.* per cent. on the sum insured, until a

¹ Darnley v. London, &c. Railway, Law Rep. 2 H. L. 48.

final account of the proceeds of the sale of the materials is furnished to the underwriters. That the sum to be paid by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee ; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society." The declaration then alleged that the plaintiff " has performed all the conditions and things on his part by the said contract, policy, rules, and regulations to be performed ; but that although he has always been ready and willing that such loss should be ascertained and settled by the said committee according to the rules of the said association of which the defendant had notice ; and although the plaintiff has requested the defendant and the said committee so to ascertain the said loss, and although a reasonable time for them so to do elapsed before the commencement of this suit, yet the said committee has refused and neglected so to do ; and although two months have expired since the date of the first quarterly settlement of the said association, which occurred next after the said committee had notice of the said loss ; and although a final account of the proceeds of the sale of the materials of the said ship was furnished to the underwriters of the said policy, in accordance with the said rules, long before the commencement of this suit ; and although a reasonable time for the defendant and the said committee to pay the said loss elapsed before the commencement of * this suit, yet neither the defendant nor the said * 813 committee has paid such loss, or any part thereof."

The defendant pleaded several pleas, but the only pleas material to the case of this policy are the fifth and sixth.

The fifth^{*} plea stated that one of the rules and regulations of the Newcastle A 1 Insurance Association is as follows : " 25. That the sum to be paid by this association to any suffering member, for any loss or damage, shall in the first instance be ascertained and settled by the committee, and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, which can only be claimed according to the customary mode of payment

in use by the society. And if a difference shall arise between the committee and any suffering member, relative to the settling any loss or damage, or to a claim for average, or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another. And if the committee refuse for fourteen days to make such selection, the suffering member shall select two and in either case the two selected shall forthwith select a third, which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute, according to the rules and customs of the club, to be proved on oath by the secretary." — "And in all cases where arbitration is resorted to, the settlement of the committee to be wholly rescinded, and the statement begun *de novo*. Provided always (and it is hereby expressly declared to be a part of the contract of insurance between the members of this association), that no member who refuses to accept the amount of any loss as settled by the committee, hereinbefore specified, in full satisfaction of such loss, shall be entitled

* 814 to maintain any * action at law, or suit in equity, on his policy, until the matters in dispute shall have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award. And the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit."

The plea then stated, that "the said committee, in pursuance of the said rule, proceeded to ascertain and settle the said loss, but before they had ascertained or settled it a difference and dispute arose, which has ever since existed between the said committee and the said plaintiff, relating to the said insurance, to wit, as to the extent of the said loss, and as to the repairs done to the said ship, and as to the sum to be paid by the said association to the plaintiff in respect of such loss; by reason and means and in consequence of which difference and dispute the said loss never has been ascertained or settled by the said committee." Averment of readiness and willingness by the committee to refer, and the refusal of the plaintiff so to do; "and the matters of the said difference and dispute have not nor has any of them been referred to arbitrators or decided, nor has the said loss been ascer-

tained or settled by arbitrators, as by the said rule is in such case required."

The sixth plea stated, "that the said committee did not refuse or neglect to ascertain the said loss as alleged, but, on the contrary, the defendant says that the committee did within a reasonable time in that behalf, and before the commencement of this action, ascertain and settle the sum to be paid by the said association to the plaintiff for the said loss, as the plaintiff well knew; but the plaintiff was dissatisfied with the settlement so made by the said committee, and declined to accept the sum at which they so ascertained and settled the said loss; and thereupon a *difference and dispute arose, which has ever since existed *815 between the said committee and the said plaintiff, relating to the said insurance, to wit, as to the extent of the said loss, and as to the sum to be paid by the said association to the plaintiff in respect of such loss." The plea then alleged that the rule set out in the fifth plea was binding on the plaintiff and defendant, and stated as before, that the defendant and the committee were willing to refer, but this the plaintiff refused, &c.

Demurrer and joinder. Upon the argument of the demurrers at the sittings after Hilary term, 1853, the Court of Exchequer gave judgment for the plaintiff in error.¹

On error brought the Court of Exchequer Chamber reversed that judgment, and gave judgment for the defendant in error.¹ This writ of error was thereupon brought.

The Judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Cresswell, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, and Mr. Justice Crowder attended.

Mr. Atherton and *Mr. C. E. Pollock* for the plaintiff in error. — The fifth plea is bad. It sets up an agreement which is in itself illegal, as ousting the jurisdiction of the Courts of law, and which, if it could be good, is likewise inapplicable to the state of facts there set forth. The supposed agreement assumes the right of action in a suffering member when the committee shall have settled the claim, but denies that right if the member questions the amount thus settled. The effect of that would be to restrict

¹ 8 Exch. 487 - 497.

the right of the member to sue for any sum except that
 *816 which the committee *might choose to award him. The law will not allow such a restriction ; besides, the facts stated in the plea show such a supposed rule to be inapplicable, for they show that the committee never did come to a final decision as to the amount, so that the plaintiff never was in the condition of a member who refused an amount settled by the committee. In that respect, therefore, the plea affords no answer to the action.

The declaration established a clear, complete, independent contract of insurance, and not a contract depending on what might be done on the intervention of a third party.

[LORD CAMPBELL. — All the rules and regulations are expressly made part of the contract.]

That is so, but the question is how far one of those rules, which contravenes a principle of law, can be operative. That rule professes to make an award a condition precedent to the right to sue, except for a sum awarded. Such a condition is illegal.

It is admitted that a mere agreement to refer cannot be a bar to an action. This is nothing more than a mere contract to refer ; it is the ordinary arbitration clause, but it is not a submission, for the arbitrator is neither chosen nor appointed. If, therefore, the plaintiff is deprived of his right of action the sum may never be settled, and he will never obtain compensation for his loss.

Now, as to the sixth plea, which if good does entirely bar the right of action. On that plea the question is, whether by the operation of that rule attaching on the policy the plaintiff is barred from proceeding at law, and is bound to resort to an arrangement by arbitration such as the twenty-fifth rule describes. The terms of that plea may be a little more stringent than those of the fifth plea, but this again is an attempt to set up an agreement to refer as a bar to an action at law, or else the agreement
 *817 is altogether void, * because, while it pretends only to affect the amount of the claim, it really involves the principles on which that claim is founded. Total loss, average loss, deviation, and all other matters, are included within it. The words of the condition itself are, not merely any difference as to the amount, but also “any other matter relating to the insurance.” That might involve questions of the most difficult nature in insurance, all which, it is contended on the other side, must be referred to arbi-

tration, and absolutely decided by two out of the three arbitrators, without the assured being at liberty to bring them under the consideration of a Court of law. That cannot be a valid agreement.

This is not a contract to pay the assured, in the event of loss, so much as certain parties shall determine. It must be contended, on the other side, that nothing is due till a third person has intervened and settled the amount, but then it is clear, notwithstanding the machinery resorted to, that the intention is that the underwriter shall not make good a loss except after reference to arbitration. That intention cannot be carried into effect, for it is illegal. This is said to be nothing but an agreement to ascertain an amount, but then the reference to ascertain it must come after a difference, after a cause of action accrued, and consequently it is an agreement to exclude the Courts from jurisdiction upon an existing cause of action. If so, the case cannot be brought within that class of cases in which work is to be done, and the sum due for it is to be ascertained by a third person previously nominated, for in those cases the cause of action only arises on the sum having been ascertained. Take a farming lease, with a mutual covenant that in the event of difference with respect to any of the covenants on either side, the question in difference shall be referred. Now, suppose a breach of covenant by nonpayment of rent, or nonperformance of some * farming obligation, it is clear that an action * 818 would lie for either of them, though no reference had taken place. That is precisely this case. *Kill v. Hollister*,¹ which was an action on a policy of insurance, with a clause like this, is precisely in point here, and distinctly lays down the rule that such an agreement as this cannot oust the jurisdiction of the Courts. *Philips v. Bury*² decided that even the founder of a college, by giving power to a visitor, could not exclude the common law; and in *Wellington v. Mackintosh*³ Lord Hardwicke objected to such a plea, even in a suit for a discovery, and gave relief, a course of which Story, in his "Equity Jurisprudence,"⁴ expresses his approval. *Halfhide v. Fenning*,⁵ a decision of Sir Lloyd Kenyon, when Master of the Rolls, which appears to decide the contrary, was in substance overruled by Lord Kenyon himself in *Thompson v. Charnock*,⁶ where the rule was treated as entirely settled; and

¹ 1 Wils. 129.

² 1 Ld. Raym. 5.

³ 2 Atk. 569.

⁴ § 670.

⁵ 2 Brown, C. C. 336.

⁶ 8 T. R. 139.

in the notes in Belt's edition of Brown's "Chancery Cases"¹ reference is made to several cases, where the doctrine supposed to be laid down in *Halfhide v. Fenning* was distinctly condemned by Lord Eldon. Two of the cases thus referred to are *Street v. Rigby*² and *Waters v. Taylor*.³ *Tattersall v. Groote*⁴ declares that no action can be maintained on such an agreement for not naming an arbitrator, so that a suffering party might be left without any remedy; and *Harrison v. Douglas*⁵ shows that a condition of a kind like this incorporated into a policy does not constitute a condition precedent.

The principle on which the law proceeds is thus stated in Sheppard's "Touchstone":⁶ "Where the condition of an * 819 * obligation is repugnant to the obligation itself, there the condition is void and the obligation good, and therefore if the condition of an obligation be, that the obligee shall not have benefit by the obligation, or that he shall not sue for the money in the obligation, or the like, this condition is void." The doctrine now contended for by the plaintiff in error is declared in *Watson on Awards*,⁷ to be the result of all the authorities.

Mr. Bramwell and *Mr. Manisty* for the defendant in error. — There is no principle in law which prevents a man from agreeing to pay to another the sum which a third shall declare to be the fair value of goods sold, nor any which prevents a similar agreement as to the compensation to be paid for doing or not doing a particular act. If A. will build a house for B., the latter may agree to pay such sum as a third person shall award to be proper; that is a good agreement and may be enforced: *Thurnell v. Balbirnie*.⁸ Suppose an agreement by A., that if he does not farm certain land in a particular way he shall pay to B., the landlord, such a sum as C. shall declare to be the difference occasioned by A.'s mode of farming; that is the case of an action depending not on what A. has done, but on what C. shall find to be the amount of loss thereby occasioned. Such an agreement would be perfectly good, and the action would only arise when C. had settled the amount. That is exactly the case here; and in the case

¹ 2 Brown, C. C. 336 n. 1, 4, 5.

² 6 Ves. 815 – 820.

³ 15 Ves. 10 – 18.

⁴ 2 Bos. & P. 131.

⁵ 3 A. & E. 396.

⁶ Chap. 21, § 4, p. 373.

⁷ Page 10.

⁸ 2 M. & W. 786.

supposed, C. would have to determine not only the amount, but the principle on which the amount was payable, and till C. had determined no action would lie.

Then is this an absolute covenant to pay the loss the plaintiff claims, or to pay the sum which certain persons * are to * 820 declare to be the amount of the loss. It is clearly the latter. In the declaration, the complaint is not only that the loss has been suffered, but that the amount of the loss has not been settled by the committee, and in truth no cause of action at all arises till the committee has ascertained the amount of the loss. The whole spirit of recent legislation has been in favour of references, and there is no principle of law violated by an agreement of this kind. The principle applicable here is, that the real intentions of the parties shall be carried into effect, and that is the principle which is declared and adopted by Vice-Chancellor Turner in *Squire v. Ford*.¹

There is no repugnancy here. The covenant here is not a mere personal covenant, and therefore repugnant to the whole deed, as in the case of *Furnivall v. Coombes*,² where a proviso that a churchwarden should not be personally liable for not duly discharging the duties of his office was rejected as repugnant. The rule therefore cited from Sheppard's "Touchstone" is inapplicable; this is not an absolute contract of insurance, but is a contract that, subject to the provisions thereafter contained, the member shall be indemnified against loss. One of those provisions is that the amount of the loss shall be settled by the committee, or in case of dispute by reference. Such a provision is perfectly lawful, in accordance with the principles stated by Sir W. Grant, Master of the Rolls, in *Milnes v. Gery*.³

This condition in the policy is good, and equity would interfere to restrain a party who, after a submission on a contract like this had been made a rule of Court, should proceed to bring an action at law in disregard of the condition.

* *Mr. Atherton*, in reply. — There is a broad distinction * 821 between this case and those where the agreement is to pay for work such sum as a third party shall declare to be its value. This is a valued policy, and on the loss happening the right to

¹ 9 Hare, 57.

² 14 Ves. 408.

³ 5 Man. & G. 736.

indemnity is complete. On the loss happening there was a breach of the contract, for the contract is not to pay so much on a certain event occurring, but that a certain event shall not occur. To interpret the contract in the way contended for by the other side, might be to leave the assured without any remedy whatever.

THE LORD CHANCELLOR proposed that the following question should be put to the Judges: "Whether, looking at the record in this case, the judgment ought to be given for the plaintiff in error or for the defendant in error?"

LORD BROUGHAM and LORD CAMPBELL expressed their opinion that the case had been ably argued, and concurred with the Lord Chancellor as to the form of the question to be put to the Judges.

The Judges requested to be allowed time to consider the question.

Ordered.

9 July.

MR. BARON PARKE said that the Judges requested further time to consider, and the case was adjourned accordingly.

19 May, 1856.

MR. JUSTICE CROWDER. — My Lords, in order to answer your Lordships' question, it is only necessary to advert to the first count of the declaration and the sixth plea, because to the other counts similar pleas have been pleaded; and as I am of opinion that the sixth plea furnishes a complete defence to the
* 822 * action, my answer to your Lordships' question is, that judgment ought to be given for the defendant in error.

The question, whether this plea is a defence to the action, must depend upon the true construction of the contract entered into between the parties. On behalf of the plaintiff it was argued, that the contract was to indemnify him for the loss of his ship, and that the rule relied upon by the defendant was a further stipulation or agreement between the parties, that all disputes relative to the insurance should be settled by arbitration, and that, as this stipulation violated the principle of law that the jurisdiction of the Courts at Westminster cannot be ousted by the agreement of parties, the twenty-fifth rule afforded no answer to the present action.

It was contended on the part of the defendant, that the policy of insurance, coupled with the twenty-fifth rule, which is virtually incorporated in it, was not a contract of indemnity which gave any right of action to the plaintiff upon the happening of a loss by perils of the sea ; but that the defendant only thereby undertook to pay the plaintiff, in case of a loss, such sum as should be ascertained and settled by arbitration. Now it was clearly the intention of both parties to enter into such a contract as the defendant's counsel suggested, and this was admitted by the plaintiff's counsel in the argument at your Lordships' bar ; and it must also be admitted, that no language could be stronger or more appropriate to express such intention ; for it is distinctly declared by the proviso in the twenty-fifth rule to be a part of the contract of insurance, that no member who refuses to accept what is settled by the committee shall be entitled to maintain any action until the disputed matters shall be settled by arbitration, and then only for such sum as the arbitrators shall award ; and it is declared that that is a condition precedent to the maintenance of any action.

* The question then seems to resolve itself into this, * 823 whether such a contract can legally be made so as to bind the contracting parties. Can a shipowner and an insurer enter into a valid agreement that the shipowner shall pay down a given sum, and that in consideration of such payment the insurer, upon the loss of a given ship, shall pay to the said owner, not the amount of the loss sustained by him through the perils of the sea, but only such a sum of money as shall be settled and ascertained by arbitration. I am not aware of any legal objection to such a contract, whatever may be thought of its prudence. And I think the effect of such a contract is, that no action lies for the breach of it until the sum has been ascertained by arbitration. It was held in a Court of equity that where there was a contract of sale at a price to be fixed by the valuation of two persons named, or their umpire, no bill would lie for a specific performance until the valuation had been made according to the terms of the contract, although it was contended, and indeed it could not be denied, that the Court by its Master might ascertain what was a reasonable sum for the price ; *Milnes v. Gery* ;¹ and the cases of *Thurnell v. Balbirnie*,² and *Milner v. Field*,³ are authorities to show that Courts of

¹ 14 Ves. 408.

³ 5 Exch. 829.

² 2 M. & W. 787.

law have put a similar construction on such contracts when actions have been brought for an alleged breach of them.

In this view the doctrine referred to by the plaintiff's counsel, that no agreement of parties can oust the Courts of law of jurisdiction, is inapplicable to the present case; for in all the cases in which that doctrine has been applied, there has been a clear cause of action existing upon the covenant or agreement, independently of the particular covenant or agreement to refer. Such * 824 were the cases of * *Kill v. Hollister*,¹ and *Thompson v. Charnock*,² relied upon by the plaintiff.

The fallacy of the argument on behalf of the plaintiff lies in the assumption that there ever has arisen a cause of action in the present case. Collecting the substance of the contract from the allegations in the first count of the declaration and the sixth plea, it appears to me that no cause of action can arise before the sum to be paid is ascertained and settled by the arbitrator. Nor do I see how it can be held otherwise, without making a contract for the parties quite different from that which they really made in express terms for themselves; for if this action is maintainable it must be so by rejecting the twenty-fifth rule as part of the contract, and by holding that a good contract of insurance remains, which has been broken. But the premium was not paid by the plaintiff for such an absolute indemnity by the defendant; and it may well be that a less sum by way of premium was demanded by the defendant, on the very ground that the contract of insurance was varied and modified by the twenty-fifth rule of the association. It is only a qualified contract of insurance, contravening no law, which the parties therefore were at liberty to enter into, and by which they must be bound.

For these reasons I am of opinion that judgment ought to be given for the defendant in error.

MR. BARON MARTIN.—In answer to the question proposed by your Lordships to the Judges, I have to state that, in my opinion, looking to the record, judgment ought to be given for the plaintiff in error.

The question arises upon demurrers to the fifth, sixth, ninth, and twelfth pleas. [His Lordship stated them.] And is,
* 825 * What is the legal operation of the agreement between the

¹ 1 Wils. 129.

² 8 T. R. 139.

parties, contained in the twenty-fifth rule or condition, as to referring matters in dispute to arbitration? Does it, or not, preclude the assured from suing in a Court of law on the policy?

In the argument before your Lordships it was not contended but that the law upon this subject was correctly laid down in the case of *Thompson v. Charnock*.¹ That was an action upon a charter party under seal, and it was pleaded in bar that by the twenty-ninth article of the charter it was agreed that in case any difference should arise between the parties touching the agreement, or any thing relating thereto, the same should be settled and adjusted by three arbitrators, to be chosen in the manner provided. The plea then alleged that the cause of action arose upon another article of the charter, and that, although the defendant had always been ready and willing to refer, in conformity with the twenty-ninth article, the plaintiff would not. This plea was demurred to, and the demurrer argued, and the plea adjudged to be bad. Lord Kenyon, in delivering the judgment of the Court, said it had been decided again and again that an agreement to refer to arbitration is not sufficient to oust the Courts of law or equity of their jurisdiction. The authority of this case has, I believe, never been doubted.

The case of *Tattersall v. Groote*² is also to the same effect. Charter parties and policies of insurance are both ordinary and well-known contracts, and there can be no difference between them in this respect.

The substance of the twenty-ninth article of the charter party sued on in *Thompson v. Charnock*, and the plea founded upon it, was this, that it had been agreed between the parties that in the event of the one making a claim against * the other, the claim should * 826 be submitted to the three arbitrators, and that until the arbitrators had decided, no cause of action for which a suit could be maintained existed; or, in other words, that the decision of the arbitrators was a condition precedent to maintaining an action; and that the only action at law which could be maintained upon the charter party was an action grounded upon the submission to arbitration contained in it, and the award to be made by the arbitrators for the nonpayment of the sum or the nonperformance of the thing awarded to be paid or done. This is the plain and manifest substance of the plea, and it was adjudged to be bad; and the propriety of this judgment is not now disputed.

¹ 8 T. R. 139.

² 2 Bos. & P. 131.

What then is the substance of the twenty-fifth article or rule in the present case, and the plea which is founded upon it? It begins by stating that the plaintiff, (the assured) and the committee (who represent the underwriters) should endeavor to settle and agree upon the sum to be paid for the alleged loss or damage; or, in other words, should endeavor to settle the matter amongst themselves; and then proceeds thus: That if a difference should arise between the committee (being the persons representing the underwriters) and the assured, "relative to the settling any loss or damage, or to a claim for average, or any other matter relating to the insurance," then that the assured should select one arbitrator, and the committee another, which two arbitrators so selected should appoint a third, and which arbitrators, or any two of them, should decide upon the claim or matter in dispute; and that the assured should not be entitled to maintain any action at law or suit in equity until the matter in dispute should have been referred to and decided by the arbitrators (that is, until they have made their award); and that the only action at law to be maintained

* 827 upon the policy was one for the sum * awarded by the arbitrators; and that the making of the award was a condition precedent to the right of the assured to maintain any such action; that the defendant (the underwriter) and the committee had been always willing to refer, but that the plaintiff (the assured) would not.

It seems to me that the two pleas are identical. The wording of the twenty-ninth article of the charter party and the twenty-fifth condition of the policy are framed in different words, but in substance they are the same, and the twenty-fifth condition is merely a long statement expressing by circumlocution, and probably framed by design, so to do the same thing which is shortly and clearly expressed in or follows by necessary implication from the twenty-ninth article of the charter party in *Thompson v. Charnock*. The only real difference is, that in the condition of the policy there is expanded or stated at length what would be implied as the necessary legal consequence if the twenty-ninth article of the charter party was binding. The manifest object of the parties was to keep away from the jurisdiction of the ordinary Courts of law and equity any question of difference which might arise upon the contracts, and merely to make use of the Courts to enforce the award of the arbitrators. This, in my judgment, the law will not permit, and whether it be attempted

to be done directly or indirectly, I think the attempt is equally unavailing.

The ground upon which the claim made by the plaintiff before the committee was rejected is not stated. Any one may therefore be assumed, as, viz. the ship not being seaworthy, if seaworthiness be a defence in this particular case, the assured not being interested, the ship having been engaged in an illegal voyage, having broken a blockade, or in the case of a voyage policy having deviated, or on any other of the very numerous grounds of defence which may be made to a claim on a policy of insurance. * A difference has then arisen, and upon a matter * 828 relating to the insurance, and then by the express words of the twenty-fifth rule the obligation to refer arises, and the jurisdiction of the Courts of law and equity is excluded.

The cases cited by the learned counsel for the defendant in error seem to me not applicable. One was *Thurnell v. Balbirnie*,¹ where goods were to be brought at the valuation of two persons; and it was held that no action could be maintained until the valuation was made. This is a very different thing from a stipulation that any difference whatever arising upon the contract should be referred. The others were the class of cases where work is to be valued by a surveyor, or on which no payment is to be made, except upon the certificate of an engineer.

In my opinion, all these cases are distinguishable. They would have applied if the policy had provided that, whatever misfortune might happen to the ship, and under whatever circumstances it might occur, the underwriters would nevertheless be responsible, and would pay the amount of damage to be, and as, ascertained by a third person. This may be a valid term in a contract. It would only be the substitution of an arbitrator for a jury, to ascertain the amount of admitted damages, which is a very different thing from the twenty-fifth condition, which provides that every question or matter of dispute whatever arising upon this policy is to be referred to arbitration.

There is a class of cases, of which *Crisp v. Bunbury*² is one, where it has been decided that upon the construction of Acts of Parliament the jurisdiction of the Courts at Westminster is excluded in questions arising in friendly societies and burial clubs.

¹ 2 M. & W. 786.

² 8 Bing. 394.

These cases have no bearing whatever upon the present. They depend upon the construction of the Acts of Parliament.

* 829 * It was asked, Were these conditions illegal? The answer is, They are not; that they are of the same class of contracts as all submissions to arbitration were before the Statute 3 & 4 Wm. 4, c. 42, and as such submissions now which are not included within its provisions, viz. binding and operative if the parties choose to act upon them, but revocable at their will.

It was said that the parties, by express agreement between themselves, had made the decision or award of the arbitrators a condition precedent to the right of any member to maintain an action. This is so; but if the matter be examined into, it will be found to be nothing more than what is included in every such contract. If the provision be binding, the consequence would be, in the event of a dispute, recourse must be had to an arbitrator, and an award made; but arbitrators have no power to enforce their awards; they cannot issue execution upon them; a Court of law or equity must be called in aid to enforce an award adversely. Therefore, in every case, if the agreement to refer be binding, the award must be a condition precedent to maintaining an action, and such condition is tacitly implied. The maxim of law is, "*Expressio eorum quæ tacite insunt nihil operatur.*"

It seems to have been considered as if upon the award being made, the Courts of law or equity would have some jurisdiction to inquire into and adjudge upon the policy and questions arising upon it; but this is not so. Upon the award being made, unless the arbitrators have been guilty of fraud, the Courts have no power to inquire whether the arbitrators have awarded rightly or wrongly, according to law or against it. If the award be regular, they must treat the matter as *rem judicatam*.

It has been said that parties best understand their own affairs, and ought to be permitted to make their own contracts;
* 830 * and the less Courts of law and equity interfere, except merely to enforce them, the better. There can be no doubt of the truth of this as a general rule; but there are certain contracts which no one would contend ought to be binding; for instance, suppose a man to contract to commit a crime, or to become the slave of another for life, all would agree that such contracts were not binding, and could not be enforced in any Court. There therefore must be some limit. I quite agree it is and ought to be a

very narrow one ; but in my opinion the law has included within the limit stipulations whereby a man agrees that questions arising upon his contracts and transactions shall be withdrawn from the jurisdiction of the ordinary tribunals of the country. Such stipulations, I think, are of the same class as simple submissions to arbitration are at common law, and in their essential nature revocable. I cannot see any distinction in this respect between contracts made to submit a contemplated difference to arbitration and a contract made after one has actually arisen.

It was said that the real ground of the judgment in the cases where the agreement to refer was held not to bar the action was, that they were independent covenants ; but this is most certainly not so. The true ground I believe to be, that a prospective agreement not to have recourse to the Courts of law or equity of the country in respect of future causes of action to arise, is against the liberty of the law, which secures to every one the right of submitting to the Courts any matters in respect of which he claims redress.—Sheppard's "Touchstone."¹

I have only to add, that it appears from a note in the second edition of Mr. Watson's book on Awards, that the very identical point now in question arose in the case of *Harrison v. Douglas*,² in which Mr. Watson was counsel ; * and that * 831 the Court of Queen's Bench held that such a condition as the present could not be pleaded in bar to the action. This judgment is precisely in point, and I think is right ; and it was certainly in accordance with the opinion of that portion of the profession who were in the practice of advising on cases arising upon the north country club policies, who, until the decision of the Court of Exchequer Chamber in this action, I believe always advised that such a condition as the present did not oust the jurisdiction of the Courts at Westminster. The prevalence of this opinion was probably the reason why the learned editors did not notice the point in their report of the case.

For these reasons I think judgment ought to be given for the plaintiff in error.

MR. JUSTICE WIGHTMAN. — The only question in this case is, whether the effect of the twenty-fifth rule of the association, referred to in the policy, is to withdraw the cognizance of the whole cause

¹ Page 122.

² 3 A. & E. 396.

of action from the Courts of law, and to oust them of their jurisdiction, or only to impose upon the assurer a condition preliminary to his right to sue for a loss, that the amount of the loss shall be ascertained by arbitration. It may be that if the effect of the twenty-fifth rule would be to oust the Courts of law of their jurisdiction, and to oblige the assurer to submit his entire right to recover to the determination of arbitrators, the pleas relying upon that rule would be bad, and the plaintiff in error would be entitled to judgment. It appears to me, however, that the effect of the twenty-fifth rule is that which is given to it by the judgment of the Court of Exchequer Chamber, as pronounced by my brother

Coleridge, and to which judgment I was a party; and as * 832 the reasons for my present opinion are the same as * those which are given in that judgment, I forbear to trouble your Lordships by repeating them.

I am therefore of opinion that, looking to the record in this case, judgment ought to be given for the defendant in error.

MR. JUSTICE CROMPTON. — On the argument of this case the counsel for the defendant in error, admitting the general rule that an agreement to refer and not to sue upon a cause of action cannot be pleaded as a bar to an action, contended that the present case did not fall within that rule, on two grounds. The first of these grounds was that the arbitrators in the present case were merely to ascertain the amount, and that the case fell within that class of cases where work is to be done to the satisfaction of an engineer, or an engineer's certificate is to be given, or where valuers are to decide on the value of crops, or the like, before the cause of action is complete. On this construction of the contract our decision in the Exchequer Chamber principally proceeded.

Upon further consideration, I think that the construction we put upon the contract in this respect was not correct, and that the arbitrators were, according to the contract, to decide other matters than those of mere amount.

By a stipulation of the policy mentioned in the declaration, and immediately preceding the stipulations set out in the pleas, the loss is, in the first instance, to be proved to the committee. Then follows a clause for the committee settling and ascertaining the sum to be paid in respect of the loss or damage, and, on that

settlement being acquiesced in, a right of action is to be given to the suffering party; but if a difference arises between the committee and the suffering member relative to the settling of loss or damage, * or to a claim for average, or any other * 833 matter relating to the insurance, then there is to be a reference to arbitrators, who are to decide upon the claims and matters in dispute according to the rules and customs of the club, to be proved on oath, and in such case the settlement of the committee is to be wholly rescinded, and the statement is to begin *de novo*. The provision for the proof of the loss, in the first instance, before the committee, and the provisions for the arbitration on a difference arising between the committee and the member, not only relative to the settling of a loss or damage, but to claims for average or any other matter relating to the insurance, seem to me to show that more was to be referred than the mere matter of amount.

After these provisions, and after the provision that no action should be maintained until the matter in dispute had been decided by the arbitrators, and then only for such sum as they should award, it seems difficult to say that they were only to ascertain the amount, subject to a future investigation of the rights of the parties on a trial at law. It could not, I think, be intended that after the award of the arbitrators it should be open to the insurers to dispute the claim of the assured, on such grounds as unseaworthiness, deviation, want of interest, or of the loss not having happened through the perils insured against.

In cases of certificates of engineers, valuations by valuers, and other cases of the like description, there is not necessarily to be a judicial determination. Such persons are not arbitrators, within the meaning of the rule of law now in question. They are to certify in general from their own inspection, measurement, peculiar skill and knowledge of value; and such certificates may well be made conditions precedent to any right of action. But the present appears to be a case where there is to be a * submission, evidence on oath, a hearing of the parties, * 834 and every incident of judicial arbitration.

I now think that the proceeding to be gone through under the agreement in question was an arbitration of a strictly judicial nature, in which the arbitrators were to proceed judicially in determining the rights and disputes of the parties, and that the judg-

ment of the Exchequer Chamber cannot be supported on the ground of the proceeding being of the nature of a mere preliminary ascertainment of amounts.

The second ground relied upon by the defendant in error was, that the rule against the validity of a plea of this nature only extended to a case where there was a complete cause of action which the agreement forbade the party to sue upon, and did not extend to a case where the parties have agreed, as here, to make the right to payment contingent upon and to arise only upon the arbitrators finding that the party was entitled to a particular sum of money, and that the parties might, if they chose, make the cause of action depend upon such a finding having taken place as to the liability as well as to the amount of the loss.

It was said by the counsel for the plaintiff in error that there was a distinct promise to insure, which gave an immediate cause of action on the happening of the loss, and that the making the arbitration a condition precedent to the right of action was a mere evasion of the principle of law against agreements debarring the parties from suing in the Courts of law; whilst on the part of the defendant in error it was said that this insurance was subject to the rule in the policy, and was to be read as if that rule was embodied with it, and that the rule by the express words as to a condition precedent made the right of action depend upon
 * 835 the finding of the arbitrators having been * obtained, and that the principle of law did not apply to cases where no right of action was given until the award of the arbitrators was obtained. I think, however, that the case falls within the rule of law which will not allow a stipulation in a contract forbidding the party to have recourse to a Court of law to prevail as a bar to an action on the contract. Here the effect of the provision is, that there shall be no action on the policy in which the matters really in dispute can be decided, but that they shall be referred to a private tribunal, and that the only action shall be on the award of the private tribunal.

If such a clause were valid as a bar to an action, there might in every contract be a clause that there should be no right of action in the Courts of law until the matters had been referred to arbitration, or to some private or particular tribunal, and then only on the award or decision of that tribunal, which would effectually take away the jurisdiction of the legal tribunals, contrary, as I

think, to the long-established rule which has hitherto prevailed on this subject.

It is a legal incident to every contract that the parties should have a right to resort to a Court of law for the settlement of their disputes ; and a stipulation to the contrary is void, as being repugnant to the rest of the contract.

In this respect the case resembles that of *Furnivall v. Coombes*,¹ where a stipulation that the parties should not be personally responsible was held repugnant and void.

In like manner a clause in a deed granting a rent, by which goods seized as a distress for the rent are to be irreplevisable, is void, "it being against the nature of such a distress to be irreplevisable."²

* The stipulation that the obtaining the award of the *886 arbitrators shall be a condition precedent to the right of action, and of suing, seems to be only a mode of stating affirmatively the negative proposition, that no action shall be brought in the Courts of law. The stipulation, as I read the agreement, is, that no action shall lie except upon the award.

The disputes, other than those of mere amount, are, in my opinion, to be taken out of the jurisdiction of the Courts of law, and I think the agreement in this respect is a mere attempt to evade the rule of law. It is an agreement to insure against marine losses, but that no right of action shall arise until all disputes are settled by arbitration ; in other words that if disputes arise, the party shall be debarred from having recourse to the Courts of law for the settlement of such disputes. I think that the Court of Exchequer took the right view of the subject, and I answer your Lordships' question by saying, that in my opinion the judgment of the Exchequer Chamber ought to be reversed.

MR. JUSTICE CRESSWELL. — My Lords, I am of opinion that the decision of the Court of Exchequer Chamber was right, and that judgment should be given for the defendant in error ; that there was no contract of insurance independent of the rule upon which the sixth plea is founded ; and that such rule is not repugnant to, or inconsistent with, a contract of insurance. No attempt has been made by that rule to oust the jurisdiction of the Courts of law or equity, either as to the construction of the contract, or the remedy

¹ 5 Man. & G. 736.

² Co. Litt. 145.

to be had for the breach of it. The very rule contemplates that an action is to be brought.

* 837 * The whole of the doctrine as to ousting the jurisdiction of the Courts appears to have been based upon the passage quoted by Mr. Baron Parke¹ from Coke Littleton: "If a man make a lease for life, and by deed grant that if any waste, or destruction be done, that it shall be redressed by neighbours, and not by suit or plea, notwithstanding an action of waste shall lie, for the place wasted, cannot be recovered without plea." The case is not to be found in the Year Book, 3 Edw. 3, referred to, but is in Fitzherbert's Abridgment, "Waste," Placitum 5, and the whole of it is given in Coke Littleton. It seems that this decision proceeded on the ground that the neighbours could not redress the wrong done; that it could only be done by plea; therefore, notwithstanding the deed, an action of waste would lie. There is not a word leading to the supposition that an action would have been maintainable, if neighbours could have given the appropriate redress; or that it might not have been granted by deed, that if a dispute arose about waste, neighbours should say whether there had been waste or not. But in subsequent cases it has been considered to have established that parties cannot by agreement oust the jurisdiction of the Courts of the realm.

Another principle has also been resorted to in support of the judgment given by the Court of Exchequer; viz. that where the condition of an obligation in the matter of it is repugnant to the matter itself, there the condition is void, and the obligation good. Sheppard's "Touchstone," page 373. The law there laid down is correct; but it is based on the assumption that there is a contract independent of the condition. The question here is, whether the contract is or is not a conditional contract. In my
* 838 opinion there is * no contract to pay for a loss independent of the condition, and therefore no repugnancy.

Take the case of an ordinary policy on goods, with a memorandum at the foot as to particular articles. The insurance on them is subject to the memorandum; and no one has ever thought of saying that it was repugnant to the general insurance on goods; it is part of the contract. So here the rule is part of the contract.

Then what does the rule require? "That the sum to be paid

¹ 8 Exch. 494.

by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled, by the committee ; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society." Now, I do not understand that any of the learned Judges in the Court where this case was in the first instance decided, considered that this part of the rule was repugnant to the contract of insurance. They must therefore have thought, as I do, that it was part of the contract, and that there was no contract independent of it ; for if there is an ordinary contract of insurance, that would give a right of action immediately on the happening of a loss, and a rule requiring the assured to wait for an adjustment of the loss by the committee would be repugnant to the contract.

But if this part of the rule is not illegal, as attempting to oust the jurisdiction of the Courts, and not void as repugnant to the contract, it appears to me that the subsequent part of the rule cannot be objected to, for it merely substitutes another mode of ascertaining the amount to be * paid if the claim- * 839 ant is dissatisfied with the adjustment by the committee.

The sole authority of the committee was to ascertain and settle the amount to be paid, and therefore no difference could arise between the claimant and committee, except with reference to the amount of his claim ; and therefore, when it is provided that, " If a difference shall arise between the committee and any suffering member relative to the settling of any loss or damage, or to a claim for average, or any other matter relating to the insurance," it is plain that the word " claim " applies not only to average, but also to " any other matter," and the provision for arbitration is intended to apply only to the amount of such claim, and merely provides another mode of inquiring into the same matters which have been before the committee. In all this I find no attempt to prevent the Courts from exercising their jurisdiction in ascertaining and adjudicating upon the rights of the parties arising out of the contract which they have made. Nor do I find any repugnancy in construing the policy with the whole of this rule as part of it. In fact, it seeks only to effect the same thing in principle which

was held to be effectually done in *Milner v. Field*.¹ That was an action of assumpsit for goods sold and delivered, and work and labour. Plea, Non-assumpsit. The plaintiff had contracted with the defendant to build thirty houses for 3130*l.*, to be paid by instalments as the work progressed: Proviso, that none of the instalments should be payable unless the plaintiff should deliver to the defendant a certificate, signed by the surveyor for the time being for the defendant, that the works had been in all respects well and substantially performed, according to the specification and plans. Some instalments had been paid, and the action was brought for the balance. No certificate had been given.

* 840 There, as here, it might * have been urged that the proviso was repugnant to the contract, for the contract was to pay a certain sum for the houses, but the proviso gave the surveyor power to say that the price agreed for should not be paid. But the Court held that the proviso was a part of the contract, and that by the contract itself, obtaining the certificate was made a condition precedent to the right to payment. So here, rule twenty-five was part of the contract, and by the contract itself obtaining a settlement of the claim, according to that rule, is made a condition precedent to the right to maintain an action. And this part of the rule, as to maintaining an action, shows that it was never intended to substitute the arbitrators for the Courts of law or equity, but to make them ancillary to an action or suit; for after the settlement by arbitration it contemplates an action or suit on the policy, and not on the award.

I therefore think that, looking to the record, judgment ought to be given for the defendant in error.

MR. JUSTICE COLERIDGE. — My Lords, in my opinion, looking to the record, judgment ought to be given for the defendant in error. This action is brought on a policy of assurance, which, by the agreement between the parties, was made subject to certain rules and regulations; and the defendant in error, being sued on it, relies for his defence upon one of these rules. It is not disputed that the facts have arisen, which, supposing the rule to be valid in law, make it a good defence, nor that it was the intention of the parties that under such circumstances it should be a good defence. But it is said to be such a rule as the Courts of law will not sanc-

¹ 5 Exch. 829.

tion. That therefore is the question between the parties. I have had occasion already in the Court of Exchequer Chamber to express the opinion of that Court upon the point; and *I * 841 have heard nothing on the argument before this House to make me doubt of its correctness.

The principle of law which is relied on by the plaintiff in error is agreed on. The difference between the parties is upon the question whether it governs the present case; and this must be decided by determining the true construction of the agreement. If two parties enter into a contract, for the breach of which in any particular an action lies, they cannot make it a binding term, that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rests on a satisfactory principle or not may well be questioned; but it has been so long settled, that it cannot be disturbed. The Courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction, which has been considered a right inalienable even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the Courts. Covenanting parties may agree that in case of an alleged breach the damages to be recovered shall be a sum fixed, or a sum to be ascertained by A. B., or by arbitrators to be chosen in such or such a manner; and until this be done, or the nonfeasance be satisfactorily accounted for, that no action shall be maintainable for the breach. This position has not been questioned in the argument before the House; nor was it, I think, in the Court below.

Now, applying to the rule in question the ordinary principles of construction, that you are to look to the whole instrument, and to the expressed intention of the parties, and are not to be fettered by a too close adherence to form or order, or the strict literal meaning of expressions, where to do so would violate intention, it seems to me clear that * the defendant in error gives to it * 842 the meaning which a Court of law ought to uphold. It begins thus: "That the sum to be paid to any suffering member for any loss or damage shall in the first instance be ascertained and settled by the committee." The subject matter, therefore, is the amount of compensation to be paid where the existence of some loss or damage is assumed, and the rule specifies how first that

amount shall be ascertained. It proceeds thus: "The suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before." This supposes the amount to be recovered agreed to by the suffering member, but the cause of action not admitted by the association, and in such case leaves the former his recourse to the Courts of law for establishing it, and for enforcing the payment of the damages so ascertained. And in so doing, it is added, that he can only claim "according to the customary mode of payment in use by the society." If the rule had stopped at this point, I confess I do not see on what grounds it could have been contended that it ousted the jurisdiction of the Courts, which would not equally apply to the common case of contracts for work to be done, in which it is made a stipulation that the remuneration shall not be payable until the work be first approved, or the amount first ascertained by an engineer or surveyor, or some appointed referee.

But the rule proceeds to the alternative of a difference between the committee and suffering member; and it uses large terms respecting the subject matter of the difference. These large terms, however, do not carry the case further than those before used; for the difference must, of necessity, be in respect of some or one of the matters before in discussion between the committee and
 * 843 the member, * in which they were sifted with a view to ascertaining the amount to be ultimately sued for, if not paid after ascertainment. This provision therefore falls within the same principle precisely as the preceding one. Indeed it provides only an alternative tribunal of the same kind as the first named, and constituted for the same purpose, namely, for the preliminary ascertainment of the amount to be recovered at law if the society will not pay. In the first place, the committee is to arbitrate between the society and the member, and if he will not agree in the judgment, selected arbitrators in the second. And the submission to one or other of these modes of preliminary inquiry is made a part of the contract, a term in it, which limits the cause of action ultimately to be brought into Court.

It is true that in arriving at the sum to be sued for, the committee, or the arbitrators, may have to consider the nature of the claim, and the proofs of it; but, so in settling the amount to be recovered by a builder or a railway contractor, the architect or

engineer, or whoever may be the preliminary referee agreed on for the purpose, must examine and decide that which may really be the very point in dispute between the parties, namely, the quantity or the goodness of the work, or the quality of materials used; yet no one objects that on this account the stipulation for submission to this previous inquiry is void as ousting the jurisdiction of the Courts. I certainly am not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals. And I think the judgment of the Court of Exchequer Chamber stands on a safe distinction between an agreement which would close entirely the access to the * Courts of law and that which only imposes * 844 as a condition precedent to the appeal to them, that the parties shall have first settled by an agreed-on mode the precise amount to be recovered there.

MR. BARON ALDERSON. — My Lords, I retain the opinion which I held when this case came before the Court of Exchequer originally.

Two propositions were conceded on all hands as being true. First, that any agreement which is to prevent the suffering party from coming into a Court of law, or, in other words, which ousts the Courts of their jurisdiction, cannot be supported; and, second, it is allowed that there may be lawfully introduced into any contract a condition precedent as to settling the amount of damage, or time of paying it, being a condition which does not go to the root of the matter in dispute.

Let us try this case by the tests thus stated and admitted to be correct. Here, by the rules of the insurance office, the sum to be paid to any suffering member is in the first instance to be settled by the committee, and being ascertained is to be paid forthwith, and according to the customary mode in use by the society. This seems an instance of the second proposition. But then, in the case of a dispute arising out of this settlement by the committee, which dispute may arise relative to the settlement of the loss or damage (and this may raise a question of the principle on which such loss or damage ought by law to be ascertained), or to any claim for average (and this is often a question of some nicety), or

generally as to any other matter relating to the insurance (which certainly raises every possible question of insurance law), all such matters are to be settled definitively by a reference, the mode
 * 845 of regulating * which is specifically pointed out. Now to this there is subjoined a positive prohibition of any suit at law or in equity until this arbitration is completed. If the rule thus framed had stopped here it might reasonably have been contended that this arbitration, as it might possibly afterwards have been set right by a suit in the Courts, did not oust them of their jurisdiction, even although it originally included and disposed of all possible questions which could fall within that jurisdiction. But it does not stop there; for although it provides that a suit may thereafter be instituted in the superior Courts, yet the suit is to be only for such sum as the arbitrators may award; thus giving to the arbitrators the entire and exclusive determination of every possible question as to the law of insurance in the case of a loss, and leaving to the Courts of law alone the insignificant authority of enforcing, if necessary, by suit the fiat of the arbitrators. It seems to me sufficient to state this proposition, in order to ascertain how it should be decided. What is it but practically and really to oust the jurisdiction of the Courts, if you take from them the power to determine all possible questions, and leave them only the barren privilege of being allowed to countersign the decision, and enforce payment of the sum awarded by the arbitrators?

I am therefore of opinion that this case falls within the first of the two admitted propositions with which I began, and that the decision of the Court of Exchequer is right, and that that of the Court of Exchequer Chamber is erroneous. And this is my answer to your Lordships' question.

10 July.

THE LORD CHANCELLOR, after stating the nature of the action and the pleadings, said: This question appears to me to be one merely of construction of the policy. For there is no doubt
 * 846 of the * general principle which was argued at your Lordships' bar, that parties cannot by contract oust the ordinary Courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to, was a case decided about a century ago, *Kill v. Hollister*.¹ That was an action on a

¹ 1 Wils. p. 129.

policy of insurance, in which there was a clause, that in case of any loss or dispute, it should be referred to arbitration. It was decided there that an action would lie, although there had been no reference to arbitration.

Then, after the lapse of about half a century, occurred a case before Lord Kenyon, and from the language that fell from that learned Judge, many other cases had probably been decided which are not reported ; but in the time of Lord Kenyon occurred the case which is considered the leading case upon this subject, the case of *Thompson v. Charnock*.¹ That was an action upon a charter party, in which there was a stipulation that if any difference should arise, it should be referred to arbitration. That clause was pleaded in bar to the action which had been brought upon a breach of the covenant, with an averment that the defendant had been and always was ready to refer the matter to arbitration. That was held to be a bad plea, upon the ground that a right of action had accrued, and that the fact that the parties had agreed that the matter should be settled by arbitration, did not oust the jurisdiction of the Courts.

Just about the same time occurred a case in the Court of Common Pleas, when that Court was presided over by Lord Eldon, the case of *Tattersall v. Groote*.² That was an action by the administratrix of a deceased partner against a surviving partner, for not naming an arbitrator, * pursuant to a covenant in * 847 the deed of partnership. To that action there was a demurrer, and the demurrer was allowed. But that case, I think, can afford very little authority in the present action, or in actions similar to the present, because there the covenant was only that if any dispute arose between the partners, they would name an arbitrator. One of the partners died, and his administratrix brought an action, and Lord Eldon pointed out that the covenant did not apply to a case where one of the partners was dead, and an action was brought by his representatives. Therefore, in truth, that amounts to no decision whatever upon the general question.

There was then a case before Sir Lloyd Kenyon at the Rolls, of *Halfhide v. Fenning*,³ in which he held a different doctrine. That was a bill for an account of partnership transactions. The plea to

¹ 8 T. R. 139.

² 2 Brown, C. C. 336.

³ 2 Bos. & P. 131.

that bill was, that the articles contained an agreement that any difference which should arise should be settled by arbitration ; and the Master of the Rolls allowed that plea. But I think that case cannot be relied upon, because it has been universally treated as having proceeded upon an erroneous principle. There is no doubt that where a right of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect of that right of action. Now this doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been

* 848 made to arbitration. * It appears to me that in such cases as that, the policy of the law is left untouched.

And that, I take it, is what was alluded to by Lord Hardwicke, in the case of *Wellington v. Mackintosh*,¹ which was this : The articles of partnership in that case contained a covenant that any dispute should be referred. A bill was filed by one of the partners, and a plea set up that covenant to refer as a bar to the bill. Lord Hardwicke overruled the plea, but said that the parties might have so framed the deed as to oust the jurisdiction of the Court. I take it that what Lord Hardwicke meant was, that the parties might have so framed the stipulations amongst themselves, that no right of action or right of suit should arise until a reference had been previously made to arbitration. I think it may be illustrated thus : If I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen. The

¹ 2 Atk. 569.

policy of the law does not prevent parties from so contracting. And the question is here, what is the contract? Does any right of action exist until the amount of damage has been * ascertained in the specified mode? I think clearly not. * 849 The stipulation here is, that the sum to be paid to the suffering member shall be settled by the committee. Certain proceedings are provided to obtain the decision of arbitrators, and there is this express stipulation, that "the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit."

That the meaning of the parties therefore was, that the sum to be recovered should be only such a sum as, if not agreed upon in the first instance between the committee and the suffering member, should be decided by arbitration, and that the sum so ascertained by arbitration, and no other, should be the sum to be recovered, appears to me to be clear beyond all possibility of controversy. And if that was their meaning, the circumstance that they have not stated that meaning in the clearest terms, or in the most artistic form, is a matter utterly unimportant. What the Court below had to do, was to ascertain what was the meaning of the parties as deduced from the language they have used. It appears to me perfectly clear, that the language used indicates this to have been their intention, that, supposing there was a difference between the person who had suffered loss or damage and the committee as to what amount he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say.

* It was argued that here the arbitrators were to decide, * 850 not the mere amount, but other matters, as, for instance, what average was to be allowed, whether there had been a loss, and a variety of other matters which were ingeniously suggested at your Lordships' bar. In the first place, if that had been so, it would not necessarily change my view of the case. I am not at all clear that it is not so. I observe the learned Judges differed about that. I do not think it necessary to go into that, because I

am quite prepared to say that, in my view of the case, that makes no difference at all. If, in consideration of a sum of money paid to me by A. B., I agree with him, that in case J. S. should decide that A. B. had fulfilled certain conditions, and had sustained certain damage, and J. S. should make his award accordingly, I would pay to A. B. the sum so ascertained and awarded, no right of action would exist until J. S. had made his award.

I do not go into the question, therefore, whether in this case, according to the true construction of the contract, the amount of damage alone is to be ascertained, because, in my view of the case, the principle goes much further. It appears to me perfectly clear, that until the award was made, no right of action accrued, and consequently the judgment of the Court below, reversing the judgment of the Court of Exchequer, and allowing the plea, was a perfectly correct judgment.

Your Lordships have had the benefit of the attendance of the learned Judges on the argument in this case. They have differed in their opinion upon it; there was a majority, but a bare majority, in favour of the view of which I have taken of this case. Whichever way the preponderance of opinion among the learned Judges may be, and however great it may be either way, of course * 851 the ultimate decision * rests with your Lordships; but it is always satisfactory to know that the view taken by your Lordships is in concurrence with the opinion of the learned Judges. Here it is in concurrence with the opinion of a majority, though but a slender majority. However, I entirely agree with the majority; and I therefore humbly move your Lordships, that the judgment below be affirmed, and that judgment be given for the defendant in error, with costs.

LORD CAMPBELL. — My Lords, I had the advantage of hearing this case very fully and ably argued at the bar, and I have very deliberately read the opinions of the learned Judges who were consulted by your Lordships. I have also the advantage, in coming to the consideration of this subject, of finding it quite entire, having taken no part in the decision in the Court below (of course not in the Court of Exchequer), in the Exchequer Chamber. And, my Lords, after a very deliberate and dispassionate consideration of the case, I have come to the same conclusion with my noble and learned friend on the Woolsack. It appears to

me very clear (with great deference to the dissenting Judges), that upon principle, and without overturning any authority, your Lordships ought to affirm the judgment of the Exchequer Chamber.

In the first place, I think that the contract between the ship-owner and the underwriters in this case is as clear as the English language could make it, that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and, upon a deliberate view of the policy, I am of opinion, that it embraced not only the *assessment of damage, the contemplation of quantum, *852 but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers, as well as the amount to be paid. If there had been any question about want of seaworthiness, or deviation, or breach of blockade, I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured.

That being the intention of the parties, about which I believe there is no dispute, is the contract illegal? There is an express undertaking that no action shall be brought until the arbitrators have decided, and there is abundant consideration for that in the mutual contract into which the parties have entered; therefore, unless there is some illegality in the contract, the Courts are bound to give it effect. There is no statute against such a contract: then, on what ground is it to be declared illegal? It is contended, that it is contrary to public policy: that is rather a dangerous ground to go upon; I say that with great deference before your Lordships, after the view that was taken in a very important case lately decided in this House;¹ but what pretence can there be for saying that there is any thing contrary to public policy in allowing parties to contract, that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if

¹ Egerton v. Brownlow, 4 H. L. Cas. 1.

he were not allowed to enter into such a contract. Take the case of an insurance club, of which there are many in the north of

England; a noble Lord now present, who is connected with * 853 that part of the country, is probably * aware of it; there are insurance clubs of this sort in Newcastle and in all the seaports of the north. Is there any thing contrary to public policy in saying that the company shall not be harassed by actions, the costs of which might be ruinous, but that any dispute that arises shall be referred to a domestic tribunal, which may speedily and economically determine the dispute? I can see not the slightest ill consequences that can flow from such an agreement, and I see great advantage that may arise from it. Public policy, therefore, seems to me to require that effect should be given to the contract.

Then, my Lords, when we come to the decided cases, if there had been any decision which had not been reviewed by your Lordships, which adjudged such a contract to be illegal, I should ask your Lordships to reverse it; for it would seem to me really to stand on no principle whatsoever. It probably originated in the contests of the different Courts in ancient times for extent of jurisdiction, all of them being opposed to any thing that would altogether deprive every one of them of jurisdiction. There is a saying of Lord Coke, which is the original foundation of this doctrine: it is this, "If a man makes a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbours, and not by suit or plea; notwithstanding, an action of waste shall lie, for the place wasted cannot be recovered without a plea." Where an action is indispensable, you cannot oust the Court of its jurisdiction over the subject, because justice cannot be done without the exercise of that jurisdiction. That is all, and there is no doubt about that. This is the foundation of the doctrine that the Courts are not to be ousted of their jurisdiction.

But I am glad to think that there is no case that I am aware of that will be overturned by your Lordships' affirming * 854 * the judgment now in dispute. Because all that has been hitherto decided in *Thompson v. Charnock*, and the other cases referred to, is this, that if the contract between the parties simply contains a clause or covenant to refer to arbitration, and goes no further, then an action may be brought in spite of that

clause, although there has been no arbitration. But there is no case that goes the length of saying, that where the contract is as it is here, that no right of action shall accrue until there has been an arbitration; then an action may be brought, although there has been no arbitration. Now, in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any Court whatsoever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined. Therefore, without overturning the case of *Thompson v. Charnock*, and the other cases to the same effect, your Lordships may hold that, in this case, where it is expressly, directly, and unequivocally agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no such arbitration.

It gives me great satisfaction to know that while this case has been pending, there has been a decision bearing upon this question in the Court of Exchequer, in which this case arose (a Court which has recently lost a very great ornament and a very high authority), and that case is expressly in point with the present, and seems to me, further, to show that this judgment of the Court of Exchequer Chamber ought to be affirmed. My Lords, that is a case which was decided in Hilary term of the present year: it is the case of *Brown v. Overbury*.¹ It was an action * on a horse race. The winner, who had contributed to * 855 the sweepstakes, said that his horse had won, and brought an action against the stakeholder to recover the stakes. But it was a condition of the race, that if any dispute arose, the stewards should decide. He first attempted to say that the stewards had decided; but it turned out that the stewards had not decided, for they differed in opinion. Then he attempted to show that his horse had won. But the Judge held that he could not go into that; that even if the horse could clearly be shown to have won, the action had not accrued till the arbitrators, the stewards, had determined; and so the plaintiff was nonsuited. The case was brought before the Court of Exchequer, and the Judges of that Court unanimously concurred in the ruling of the Judge at *Nisi Prius*, and upon this very reason, that it was part of the contract

¹ 11 Exch. 715.

that the stewards should decide, and not a jury, and that it could not be brought before a jury till the stewards had determined ; and they would not allow the plaintiff to recover either the sweepstakes or his own contribution, and the nonsuit was confirmed. Now I cannot distinguish that case, in principle, from the present. Substitute stewards for arbitrators, and it is the same question, whether it is a contract of insurance, or a contract upon a horse race, which by Act of Parliament is legal. The Court of Exchequer held, that in that case the action could not be maintained until the stewards had decided, and that therefore it was a good defence to the action that the stewards had not decided. Here the plea is, that the arbitrators have not decided as to the liability of the underwriters, or the amount to be recovered, and therefore an action will not lie. That seems to me to be a strong authority in point, and calculated to remove any scruples that any of

* 856 your Lordships * may have in maintaining the judgment of the Court of Exchequer Chamber.

For these reasons, I am happy to say that I entirely concur in the view of this case taken by my noble and learned friend the Lord Chancellor, and I think the judgment ought to be affirmed.

THE LORD CHANCELLOR. — I ought to state, before I put the question, that I have communicated with Lord Brougham, who heard the case argued, but is now absent, in consequence of illness, and he authorises me to say that he entirely concurs in the view which my noble and learned friend and myself have taken of this case.

Judgment for the defendant in error, with costs.

Lords' Journal, 10th July, 1856.

OSWALD v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE
BOROUGH OF BERWICK-UPON-TWEED.

1856. June 23, 24, 27; July 15.

JAMES JEFFREYS OSWALD, *Plaintiff in error.*¹
 The MAYOR, ALDERMEN, and BURGESSES of } *Defendants in error.*
 the borough of BERWICK-UPON-TWEED, . }

Surety, Discharge of, by Change in Obligation.

The 5 & 6 Wm. 4, c. 76, § 53, required that the council of a borough should annually elect the treasurer of the borough. While that Act was in force, D. M. was elected treasurer of the borough of * Berwick for "the * 857 year ending 9th November, 1842, if it should so long please the said council, but not otherwise." He gave bond with sureties for the due discharge of the duties of his office. The bond recited the election, and was conditioned for the due accounting by D. M. for all such monies, &c. "as I, the said D. M., shall or may recover, or receive, in virtue of my said appointment as treasurer as aforesaid, during the whole time of my continuing in the said office in consequence of the said election, or under any annual or other future election of the said council, to the said office." After this bond had been given, the 6 & 7 Vict. c. 89, was passed. The sixth section of that Act repealed the fifty-eighth section of the previous statute, and directed that, instead of the treasurer being annually elected, he should "hold his office during the pleasure of the council for the time being." D. M. was re-elected in November, 1843, after the passing of this latter statute: no fresh bond was taken: —

Held, that under the original bond, the sureties continued liable; that the election in November, 1843, was "a future election," within the true intent and meaning of the bond; and that D. M. did continue in the office of treasurer within the true intent and meaning of the said bond.

THIS was an action of covenant. By a deed poll or writing obligatory, dated in January, 1842, under the hands and seals of David Murray, John Campbell Renton, James Jeffreys Oswald, William Murray, and John Johnston, the last four persons became bound as sureties for the due discharge by David Murray of the

¹ There were three actions in the Court below, and three writs of error in this House. The first writ of error was brought in the name of Dobie and another, executors of William Murray v. The Mayor, &c. of Berwick, and under that name the case was argued. The other cases, involving precisely the same point, were made to depend on the decision of the first. It has been deemed more convenient to retain in this report the name under which the case was heard and reported in the Court below.

duties of the office of treasurer of the borough of Berwick-upon-Tweed. The deed recited the resolution of the town council, passed in the previous December, requiring sureties to the amount of 2000*l.*, and that "at every quarterly and adjourned meeting of the council, and also at any special meeting, if then required so to do, the treasurer should present a correct account of the cash in his possession, and that the treasurer should be appointed for the re-

mainder of the year, ending the 9th of November, 1842,¹ if it
 * 858 should so long please * the said council, but not otherwise."

The deed then recited the appointment of David Murray, and declared the duties he undertook, one of which was, "well and truly to pay unto the said mayor, &c., or to their successors in office, all such rents, sum and sums of money, principal, interest, and penalties, and other monies whatsoever, as I, the said David Murray, shall or may recover or receive, in virtue of my said appointment as treasurer as aforesaid, during the whole time of my continuing in the said office, in consequence of the said election, or under any annual or other future election of [by] the said council to the said office." The liability of the sureties was limited to the sum of 2000*l.* The declaration averred, that D. Murray held the said office in consequence and under and by virtue of the said election in the deed poll mentioned, and in consequence and under and by virtue of other future elections of the said council to the said office, from the time of the making of the said deed poll until and at and after the respective times of the receiving and receipt by him as such treasurer as aforesaid of the monies, &c." Breach.

The defendant pleaded several pleas, of which the sixth and seventh are alone material to be considered. The sixth plea stated, that after the passing of the 6 & 7 Vict. c. 89,² the council, in November, 1843, under the authority of that Act, appointed David Murray to be treasurer of the borough thenceforth during the pleasure of the council for the time being, and he then accepted and continued in the office, under and by virtue of the last-

¹ This appointment was made under the 5 & 6 Wm. 4, c. 76, § 58, by which it is enacted, that "the council of every borough, shall in every year appoint a fit person, not being a member of the council, to be the treasurer of the borough." This provision was afterwards repealed by the 6 & 7 Vict. c. 89, § 6.

² Which by § 6 directs that in future the office of treasurer of a borough is not to be subject to annual election, but to be during the pleasure of the council for the time being.

mentioned election, and not * under any other election or * 859 appointment whatsoever. The plea then alleged performance of the duties until and at the time of the said re-election in November, 1848.

The seventh plea alleged the making, delivery, and the acceptance by the mayor, &c. of another bond, in satisfaction and discharge of the first.

The plaintiff demurred to these pleas, and took issue on the rest. The verdict was given for the plaintiff on all the issues of fact, but the judgment was stayed till there should be a decision on the demurrer. After hearing an argument on the demurrer, the Court of Queen's Bench held that the change of the mode of election in November, 1848, did not release the defendants, for that the functions and duties of the office remaining the same, the office remained the same as before.¹ The Judges in the Exchequer Chamber (Lord Chief Justice Jervis, Lord Chief Baron Pollock, and Mr. Baron Maule, diss.) afterwards affirmed that judgment.² This writ of error was then brought. The Judges were summoned, and Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Crowder, and Mr. Baron Bramwell attended.

Sir F. Kelly and *Mr. Joseph Brown* for the plaintiff in error. — This case must be treated upon principle, because no other resembles it in its circumstances, and because, though this writ of error is brought against the judgments of two Courts, three Judges of the highest authority were dissentients in the Court of Exchequer Chamber. The principle * of law * 860 might be thought to have been fully settled by the case of *Lord Arlington v. Merricke*,³ that wherever there is a change in the nature of the matter in respect of which the suretyship was entered into, the surety was discharged. There has been such a change in this case. At the time the bond now sued on was executed, the office was an annual office; the principal was certainly liable to account at the end of the year, and might be called on to account at intermediate periods between the date of his appointment and the termination of it. He might not be re-

¹ 1 Ellis & B. 295.

² 2 Wms. Saund. 408 - 411.

³ 3 Ellis & B. 653.

elected if he did not then duly account. That was a protection to the sureties: *Whitcher v. Hall*.¹ The sureties must be considered to have bound themselves only with reference to that annual liability to account, which would of course be a far greater protection to them than if, by the very tenure of the office, the accounting might be postponed, and an accumulation of arrears might arise. The declaration here shows that the liability now sought to be charged against them has arisen entirely from the postponement of this early liability to account. The not duly accounting is alleged to have occurred between the day of the first election and the 24th of June, 1848. The principal might have been called on to account only at the last-named period, and then these sureties could not be liable. This delay in accounting is the mischief against which the rule of law would protect them. They would be discharged if the Legislature had changed the appointment from an annual one to one for life, or had made the treasurer accountable, not to the council of the borough, but to the Lords of the Treasury. They are equally discharged by the change now effected. And this cannot be called a continuing in * 861 the same office, * for its nature and duties are changed, and the last appointment of David Murray must be looked on as a new election under a new statute.

The words "under any annual or other future election," do not mean such an election as that which has now taken place under the 6 & 7 Vict. c. 89; that sort of election was not then anticipated; it would have been illegal when this deed was executed; and the contract, especially in a statutory obligation like this, must be taken to have reference to the state of the law at the time the contract was made. These words must mean "other future election according to the provisions of the law now in existence," which would be an annual election; or they might be introduced to meet the possible recurrence of an election such as was then made, namely, one made in the early part of the year, and terminating in the November of the same year; but they certainly could not have been intended to meet the case of an election for a longer period than a year. They must be construed according to the recital in the deed, which supposes future appointments to be made according to the law in force when the deed was executed.

The authorities show that these are the established principles of

¹ 5 B. & C. 269.

construction applicable to cases on the liability of sureties. In the *Northwestern Railway Company v. Whinray*,¹ a change in the mode of paying the principal liberated the surety. In *Kitson v. Julian*,² it was held that a bond given, like this, on an annual appointment, cannot be extended by the continuance in office of the principal, but that the liability ceases at the end of a year. Then came the case of *Bonar v. Macdonald*,³ where the principal, a clerk in a banking-house, on having his salary raised, undertook to become liable to one fourth * of the losses on discounts, and * 862 this was held to discharge the surety, though the loss sought to be recovered from him arose, in fact, not upon the new liability, but on the responsibilities of the clerk, as settled in the original agreement. In *Bartlett v. The Attorney-General*,⁴ a bond given as security for a collector of the customs was held not to extend to cover defalcations arising from his collecting a subsequently created duty upon coals. If the covenant is to do a certain thing, which at that time is lawful, and the law changes, and the thing to be done becomes unlawful, the covenant becomes void. Comyns,⁵ Broom's Maxims,⁶ *Hassell v. Long*,⁷ and *Peppin v. Cooper*,⁸ show that the words of a security like this must be restrained by the provisions of the statute under which the security is given. The Courts cannot be called on to calculate the amount of increase of risk in each case. If any increase arises, the surety is discharged.

The Solicitor-General (Sir R. Bethell) and *Mr. Manisty* for the defendants in error. — The argument on the other side, as to the change in the time of accounting, cannot be sustained when the words of the 93d section of the 5 & 6 Wm. 4, c. 76, are considered. By that section it is directed that the accounts shall be rendered once a year; when annual election to the office was dispensed with by the 6 & 7 Vict. no change was made, and there was no necessity for introducing into that statute any provision on the subject. That remains as before. There has not, therefore, been any such change in the nature of the office as to render applicable

¹ 10 Exch. 77.

² 24 Law J. N. S. Q. B. 202, 4 Ellis & B. 854.

³ 3 H. L. Cas. 226.

⁴ "Nova Constitutio," p. 28.

⁵ Parker, 277.

⁷ 2 Maule & S. 363.

⁶ Com. D'g. Covenant E 3. F.

⁸ 2 B. & Ald. 431. See *Simson v. Cooke*, 1 Bing. 452; and *Leadley v. Evans*, 2 Bing. 32.

* 863 any of * the cases or of the principles referred to by the other side. Murray was continued in the office, within the meaning of the bond, his reappointment being a continuing by "other future election" as therein described. Sureties are at liberty by law to enter into such a contract, and the words of the bond show that here they have entered into it.

The argument that the words "any annual or other future election" must mean an election for the same legal duration as that which then existed, is answered by the case of *Augero v. Keen*,¹ where such words were declared by Lord Abinger to mean the nature of the office, not its duration. An alteration in the nature of the office is alone material. No such alteration has been made here.

It may, however, be admitted that these contracts are to be construed with reference to the law in existence at the time they were made; but how would that affect this case? The law at the time required an annual election, but the words of the contract, "other future election," show that the parties meant the contract to be in force during the whole time D. Murray was in office, under whatever form of election he might hold his office.

The cases are easily answered. In the *Northwestern Company v. Whinray*,² the payment was an essential part of the contract, and the nature of the contract was altered when a salary was changed to a payment by a commission on the quantity of coal sold. In *Kitson v. Julian*³ the obligation was only for one year, at the expiration of which it came to an end, and the principal held the office beyond that period. There is no doubt about the principles stated in the judgment in *Bonar v. Macdonald*,⁴ namely,

* 864 that in order to discharge the surety there must * be something which prejudices him, or amounts to a new contract. There is nothing of the kind here. *Bartlett v. The Attorney-General*⁵ does not resemble the present, for there the nature and extent of the principal's duty were changed, and a new responsibility, of a larger kind than before existed, was sought to be cast on the surety. On the other hand, the cases of *Frank v. Edwards*,⁶ and *Worth v. Newton*,⁷ are instances where, even without such strong

¹ 1 M. & W. 390.

² 10 Exch. 77.

³ 24 Law J. N. S. Q. B. 202, 4 Ellis & B. 854.

⁴ 3 H. L. Cas. 226.

⁵ Parker, 277.

⁶ 8 Exch. 214.

⁷ 10 Exch. 247.

words as are found in this case, the liability of the surety was held to continue.

Sir F. Kelly, in reply. — The provisions of the 93d section have no effect on those of the 60th section, which specifically require an account at the end of the year of office, and provide a summary remedy in case of a refusal to account; here the termination of the office being indefinitely postponed, the compulsory accounting, which is the real protection to the sureties, is postponed with it. The moment the duration of the office was changed the nature of it was changed, and the obligation of the sureties was discharged.

It is impossible to contend that officers appointed for a year, who must at the end of each year render an account of the discharge of their duties, and officers appointed during pleasure, and who may therefore hold office for life, can be treated in any respect as identical.

THE LORD CHANCELLOR proposed that the following questions should be put to the Judges: —

“Whether the election of David Murray in the sixth plea, mentioned to have been made on the 9th of November, 1843, was a future election to the office of treasurer within * the * 865 true intent and meaning of the bond stated in the declaration?”

“Whether after such election the said David Murray did continue in the office of treasurer within the true intent and meaning of the said bond?”

Agreed to.

27 June.

MR. BARON ALDERSON. — My Lords, her Majesty's Judges have considered the two questions put by your Lordships to them, and they have deputed me to give their unanimous answer.

As to the first question, we are all of opinion that it must be answered in the affirmative.

By the recitals in the bond, dated on the 15th of January, 1842, it was stated that the council of the borough and town of Berwick-upon-Tweed had, on the 11th of January, 1842, elected David Murray treasurer, at a salary of 60*l.* from the corporation fund, and 10*l.* from the borough fund, and that the treasurer was directed to find sureties; and that at every quarterly and adjourned meeting of the council, and at any special meeting, if

required so to do, he should present a correct account of the cash in his possession. And it was lastly agreed that the treasurer should be appointed for the remainder of the year ending the 9th of November, 1842, if it should so long please the council, but not otherwise. It was then provided that the sureties should be bound for David Murray during the whole time of his continuing in office, in consequence of the said election, "or under any annual or other future election" of the said council to the said office.

At the time when this bond was executed the office of treasurer was an annual office, to which, under the Statute 5 & 6 Wm. 4, c. 76, § 58, the council was in every year to appoint a person; but by the 6 & 7 Vict. c. 89, § 6, the Legislature, after reciting that this office was then an annual one, and that such annual * 866 appointment was inconvenient * and unnecessary, directed the council in future to appoint to such office during pleasure. This Act of Parliament came into operation on the 24th of August, 1843, during the currency of the period for which the first annual election of David Murray was made, that year ending on the 9th of November, 1843. Under this new law the re-election of David Murray took place, to which your Lordships' first question relates.

Now what was the liability which the sureties undertook? It was, to be answerable for David Murray's defaults during his continuance in the office. Any breach, therefore, in the continuity of his holding the office would put an end to their liability. No such breach of continuity, however, happened. But then, according to the case of *Arlington v. Merricke*,¹ coupled with and explained by the case of *The Liverpool Waterworks Company v. Atkinson*,² the responsibility, which according to the first of those cases would have been confined to the period limited by the first election, may be increased in its duration by the words of the covenant, if their reasonable and proper construction will warrant it. That is then the question here. It is certain that the sureties meant not to limit their responsibility to the first election; for they agree to be bound, "if David Murray continues in the said office under any annual or other future election." What do these words mean? In the first place, they mean that he must continue in the said office; and this restrains the liability, not merely by the continuity, but also by the identity of the office. Its duties, therefore, *prima*

¹ 2 Wms. Saund. 403.

² 6 East, 507.

facie, must not be changed ; its liabilities and checks must not be varied ; nor even its duration or tenure altered.

But then this last, it is said, is specially provided for by * the other words, " annual or other future election " ; for * 867 the natural meaning of those words is " any future election, whether annual or other than annual." If so, the bond contains a declaration that the sureties will be liable though the duration or tenure of the office be changed, and although the appointment may cease to be annual. And in truth that change entails all the consequences which necessarily follow it, even as to the change of liabilities, if any there be ; for if the change of the duration was contemplated, and the mere change of duration necessarily varies the liability to account, that alteration of the liability to account must be considered as contemplated also. And this would make it immaterial to consider the learned counsel's elaborate argument as to increase of the risk arising out of the necessity, if the appointment remained annual, of an accounting during each year or within three months after its end, having been varied by the appointment becoming an appointment to the office during pleasure. This, even if well founded, which may be doubted, would not alter the result ; for it is an alteration of the risk which necessarily follows, if at all, from the mere change of the duration of the office, and if that change was contemplated, this increase of the risk must have been contemplated also.

But then it was said that words such as these with which we have to deal are, according to *Arlington v. Merricke*, and various other cases, to be modified and construed according to the words of the recital of the deed ; and then it is suggested that the deed must be construed as containing a recital that the future appointments must be made according to the law which was in force when the deed was executed. But this is a mere fallacy, wholly, we think, inconsistent with the words of the covenant, which are quite general.

* The reason for referring to the recitals in a deed is be- * 868 cause, from the circumstances and facts there stated, the parties themselves have plainly expressed their intention ; and consequently in accordance with that expressed and specific intention the Courts construe and modify the more general words of their covenant. But it is somewhat strange to propose that the Court should construe their covenant by what must be at most an

implied recital suggested by the counsel, and that where there is no express recital on this subject at all. And therefore, after all, we can only in the present case construe the words of the covenant without any such light being thrown upon them ; and doing so we cannot doubt that the natural and reasonable construction of the words " under any annual or other future election " is " under any future election, whether annual or other than annual."

An election " during pleasure " is beyond all doubt an election " other than annual." No one could have doubted, if the words of the covenant had been " annual or during pleasure." The words used, however, do include that, and something more, for they include all future elections, biennial or triennial, or in any other manner.

According to this construction, which we think to be the true one, the office remains the same in all respects. It is unchanged as to its duties, and as to its liabilities also, except so far as the latter are necessarily altered, if at all, by the alteration of its tenure or duration. It is undoubtedly changed as to its tenure and duration ; but then we think that this being provided for specially by the bond, does not make any difference in the continued responsibility of the sureties.

We therefore unanimously answer your Lordships' first question, that in our opinion the election of David Murray on * 869 the 9th November, 1843, was a future election * within the bond. And we answer your Lordships' second question, that in our opinion, after such election David Murray continued in the office of treasurer within the true intent and meaning of the bond.

THE LORD CHANCELLOR. — My Lords, before I finally advise your Lordships as to the course to be taken upon this writ of error, I should wish to have an opportunity of considering a little more attentively the opinion of the learned Judges which has just been delivered by Mr. Baron Alderson. At the same time I feel myself entitled to say that their opinion entirely accords with that which I formed when I heard the argument. But before I finally advise your Lordships as to the course which I think you ought to take, I wish to compare the language which has been so clearly stated in that opinion with the opinions of the three learned Judges in the Court below, who came to an opposite conclusion.

15 July.

THE LORD CHANCELLOR. — My Lords, the question here turns mainly upon the construction of two Acts of Parliament relating to municipal corporations. The first was the original Act of the 5 & 6 Wm. 4, c. 76, by the 58th section of which Act it is enacted, "That the council of every borough, on the 9th day of November in the present year, shall appoint a fit person to be the treasurer of the borough, and shall take such security for the due execution of his office as they shall think fit." By that Act he was required to be appointed every 9th day of November.

That continued to be the law as to the election of treasurers of boroughs till the year 1843, when the Act of the 6 & 7 Vict. c. 89, was passed, by the 6th section of which, after reciting that the annual election to the office of treasurer * was inconvenient and unnecessary, it was enacted that part of the former Act should be repealed, and that "the council of every borough shall, on the 9th day of November next after the passing of this Act, or on the 9th day of November next after such borough shall be incorporated, appoint a fit person, not being a member of the council, to be the treasurer of such borough, who shall thenceforth hold his office during the pleasure of the council for the time being."

Mr. David Murray having been appointed in the year 1842, previous to the passing of that Act, was elected under the provisions of that Act, in November, 1843, to hold the office of treasurer during pleasure. He afterwards became a defaulter; and the question which arose on the several actions against his sureties was, whether this bond extended to his treasurership after he had been elected "during pleasure," under the Act of 1843, or whether it was confined to his treasurership to which he was elected at the time the bond was given, namely, in 1842.

Now, that question turns mainly upon the terms of the deed [his Lordship read them]. The important words are these, "all such sums of money, &c. as I, the said David Murray, shall or may recover or receive in virtue of my said appointment as treasurer as aforesaid, during the whole time of my continuing in the said office in consequence of the said election, or under any annual or other future election of the said council to the said office."

The declaration set out the bond, to which the defendant pleaded the new election under the subsequent Act of Parlia-

ment, and at the trial the verdict was that he was elected treasurer, from time to time, but that he had not duly accounted. The contest was, whether that election under the subsequent Act of Parliament made him a continuing treasurer, liable to account, as he had been before.

* 871 * My Lords, it was held in the Court of Queen's Bench, in which the action was brought, that he was liable, and that decision of the Court of Queen's Bench was brought by writ of error to the Exchequer Chamber, where a large majority of the Judges was of the same opinion, though undoubtedly there were dissentients of the very highest character, — Sir William Maule, then a member of that Court, Lord Chief Justice Jervis, and Lord Chief Baron Pollock. Against that decision of the Court of Exchequer Chamber a writ of error has been brought, and has now been argued at your Lordships' bar, and your Lordships have had the assistance of a great number of the Judges. Those learned persons considered the case very attentively, and gave their unanimous opinion in favour of the judgment which had been pronounced by the Court of Queen's Bench. I must confess that, even if they had not been of that opinion, I should have felt no difficulty whatever in recommending your Lordships to concur in that judgment, first, of the Court of Queen's Bench, and afterwards of the Exchequer Chamber.

It has been contended, upon the authority of a well-known case in Saunders's Reports,¹ that where a person has been elected to an office, and has given a bond, with sureties, only to discharge the duties of that office, if it appeared by the recital of the bond that that office was an annual office, and he was re-elected, and continued in the office after that year, neither of the sureties was bound, nor could the party himself be bound by virtue of his bond. But that case turned upon the particular nature of the recital. The recital in that case was, that the party appointed had been appointed a postmaster for the space of six months; and

there the bond was conditioned upon his duly performing
* 872 the duties of the said office so long as * he shall continue postmaster. It was held, upon very intelligible grounds, that that meant so long as he shall continue postmaster according to the recital, namely, that he had been appointed for six months, that is to say, it bound the parties for the whole six months,

¹ Lord Arlington v. Merricke, 2 Wms. Saund. 403.

whether he continued in office for the whole of that period, or only for a part of it. But when the six months came to an end, and he was re-elected, then the recital shows that the persons then bound did not mean to be bound for a future election; because, looking at the true construction of the instrument, all the parts being taken together, it is clear that what they meant to bind themselves for was, for the holding of office during the time mentioned in the recital. But, of course, it is competent to parties to make themselves liable to a future appointment, if they think fit; and here the terms of the bond are express, that they are liable for all money "which I, David Murray, shall or may recover or receive in virtue of my said appointment as treasurer as aforesaid, during the whole time of my continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office." By the law as it then stood there could be no election but an annual election, but the parties chose to enter into a contract, binding themselves as sureties for David Murray, as treasurer, under any election, whether "annual or other." There could be no other election than an annual one, except by virtue of an alteration in the law. The law has been altered.

I do not go into the question whether any one could ingeniously find out a case in which their might be a "future election" without a change in the Act of Parliament. I think it was perfectly competent to these parties to stipulate for the continuance of the suretyship, howsoever he was elected, and for what time soever he was elected; and *if, in point of fact, he is *873 elected, and continues in office, and there is no break in his appointment, then the sureties would be liable. That was the opinion of the Court of Queen's Bench, and of the Exchequer Chamber. It is the opinion which has been communicated to your Lordships by the learned Judges, delivered by Mr. Baron Alderson, in answer to questions put by your Lordships to them at the conclusion of the argument. In that opinion I entirely concur, and I therefore move your Lordships that the judgment of the Court below be affirmed.

Judgment for defendant in error, with costs.

Lords' Journals, 15th July, 1856.

SAYER v. BRADLY.

1855. July 23, 26, 27. 1856. May 20, 23; June 26; July 24.

GEORGE SAYER, *Appellant.*
 JANE BRADLY, the wife of STEPHEN BRADLY, and } *Respondents.*
 others, }

Will. "Male Line." "Female Line." Name and Arms.

A testator directed that a certain portion of his property should be invested, and the dividends, &c. paid among his brothers and sisters and their children; that the residue should accumulate for twenty-one years after his death, at the end of which time the accumulated fund (to which the testator gave the name of his "capital property") was to become the property of "the then nearest of kin to myself in the male line in preference to the female line." The "inheritor" of this capital property was to assume the testator's surname "if not of that surname," and was to "bear and use the arms, with the differences, which may have been at any time previous to my death assigned to me." The testator in a memorandum, dated some time afterwards (and which was admitted to proof as a codicil), directed that his gold medal given for the capture of Java should descend with "the patent of my armorial bearings to the inheritor of my capital property." The Crown, in consideration of the distinguished services

* 874 of the testator, had, between * the date of the will and of the codicil, made a grant of arms to the testator "and his descendants," and failing them, then (with the omission of emblazoning the Java medal) "to be borne by the descendants of his late father, with due and proper differences." At the date of the will and at the death of the testator he had two brothers and several sisters living. The two brothers (unmarried), the unmarried sisters, and two of the married sisters died within the twenty-one years, leaving one married sister and the sons and daughters of her married sisters and of herself surviving. B., the son of a paternal uncle of the testator, claimed the "capital property" of the testator, as being the only person who answered the description of "the nearest of kin in the male line":—

Held, that he was not entitled, the words of the will not restricting the gift to a male claiming through males.

The married sister was held entitled to the "capital property."

THIS was an appeal against a decree of Vice-Chancellor Wood, which had been affirmed on appeal by the Lords Justices.

In the month of July, 1816, Commodore (afterwards Admiral) George Sayer, C. B., being then in command of the naval forces in the East Indies, wrote with his own hand, on board the ship "Leda," the will, the construction of which gave rise to the question

in this case. He first appointed his brothers Charles and Benjamin Sayer his executors; he then gave a specific legacy to a married sister, Mrs. Innes, and directed the investment of the remainder of his property in the joint names of his two brothers and of such sisters as at the time of his death should be unmarried, on trust to pay three fourths of the interest among his two brothers and his six sisters, or such of them as might be alive on each dividend day, and to apply the remaining fourth of the interest among their children for the purposes of education. At the death of the last survivor of his brothers and sisters, three fourths of the interest were to be paid to his nephews and nieces, and the remaining fourth to their children. The * will then proceeded in *875 the following terms: "At the death of the last survivor of my nephews and nieces, whether born before or after my death, the capital sum which at the death of the last survivor of them may be standing in virtue of this my will in the books of the Bank of England, shall become the property of the then nearest of kin to myself in the male line, in preference to the female line, upon the condition of the inheritor thereof assuming the surname of Sayer only (if not of that surname), and that such inheritor of the said capital sum shall bear and use, according to the law in such case enacted, the arms, with due differences, which may have been, at any time previous to my death, assigned to me." By a codicil, dated in March, 1821, the testator directed that instead of the interest of the whole of his property being divided half yearly, the interest of 10,000*l.* should be divided "among the survivors of my brothers, sisters, nephews, and nieces comprised in my will, in the proportions therein specified from time to time. And I now direct that the interest and dividends of all the remainder of my stock, over and above the interest of 10,000*l.* three per cents., shall be invested half yearly as it becomes payable from time to time, and in like manner the interest and dividends of the invested interest, in order that the same shall accumulate until the expiration of twenty-one years from and after my decease. At the termination of which period of twenty-one years, the whole capital sum then standing in the books of the Bank of England in virtue of my will, and this a codicil thereto, shall remain to be disposed of towards my then nearest of kin in the male line, in preference to the female line, under the conditions and restrictions as in my will are set forth by me; the said inheritor first paying the interest of the

10,000*l.* to the survivors of my brothers, sisters, nephews,
 * 876 and nieces until the death of the last * survivor of them, in the proportions prescribed by my will."

The testator, in April, 1831, added a memorandum (which was admitted to proof, as a second codicil), directing the distribution of certain legacies and memorials, and went on thus: "My gold medal for Java, and badge of the Order of the Bath; my Clarence medal, seals engraved with my own arms; the snuff-box presented to me by the present sovereign of the Netherlands; my ancient chinaware, left me by my great-uncle Valentine Sayer, and all my pictures, especially of my said great-uncle and his wife; silver canopy staff, Naval Histories, Thorn's 'Capture of Java,' to be preserved by them" [the executors], "to descend with the patent and painting of my armorial bearings to the inheritor hereafter of my 'capital property,' to and the descendants who may from time to time succeed thereto."

On the 20th November, 1821, a grant of arms was made to the testator, which, recording his Majesty's approbation of his services in the capture of Java, and reciting the testator's prayer for "our granting and assigning such armorial ensigns to be borne by him and his descendants, and by the other descendants of his late father Benjamin Sayer," did grant arms, introducing the Java medal, as therein described, "to be borne by him and his descendants, and without the said medal, by the other descendants of his late father Benjamin Sayer, with due and proper differences, according to the laws of arms."

The testator died on the 29th April, 1831, leaving his two brothers and six sisters surviving. Three of the sisters were married, Judith Innes, who had no children, Elizabeth Boys, who had four children, and Jane Bradly, who had six children. The appellant George Sayer, a son of the testator's paternal uncle,
 * 877 was also living at the time * of the testator's death. The testator's brothers died unmarried within the twenty-one years, and at the expiration of that period, Jane Bradly was his sole surviving sister, and therefore claimed as his nearest of kin. William Boys, the eldest son of Mrs. Boys, claimed as the eldest son of the testator's eldest sister, and the appellant claimed as the only person properly answering the description in the will, "nearest of kin in the male line."

In September, 1852, a bill was filed to obtain the declaration of

the Court as to the true construction of the will, and the cause came on for hearing before Vice-Chancellor Wood, who, on the 24th January, 1853, made a decree declaring that Mrs. Bradly was in the events that had happened entitled to have the accumulated fund, then amounting (exclusive of the 10,000*l.*) to about 64,000*l.*, transferred to her.¹ This decree having been affirmed by the Lords Justices,² the present appeal was brought.

The case was first argued in July, 1855, by Mr. Roundell Palmer and Mr. Surrage for the appellant, and by the Solicitor-General (Sir R. Bethell) and Mr. Giffard for the respondents. It was then ordered to be argued in the ensuing session by one counsel on a side. It was accordingly argued in May, 1856, by Mr. Roundell Palmer, with whom was Mr. Surrage, for the appellant, and by the Solicitor-General (Sir R. Bethell), with whom was Mr. Giffard, for the respondents.

The Judges were summoned for the hearing of the second argument, and Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Williams, Mr. Justice Crowder, Mr. Justice Willes, and Mr. Baron Bramwell attended.

* Argument for the appellant. — The words of the will * 878 signify the person or persons who are the nearest of blood to the testator in and as part of the line or course of succession which has throughout the quality of male. The construction now contended for is justified by the meaning of the phrase "male line," as used in the works of the most eminent literary men. Bacon's *Historical Tracts*,³ Hume,⁴ Gibbon,⁵ Hallam.⁶ In each of these works the male line of a particular house is described as extinguished on the deaths of certain males though daughters remained. These writers are referred to because Lord Justice Knight Bruce supposed, erroneously, that he founded his judgment on the familiar use of these words in literary composition.

Legal writers, whether treating of historical events or confining themselves to mere cases at law, give to these words the same con-

¹ 10 Hare, 389.

² 4 De G., M. & G. 58.

³ Vol. 7, Henry VII. (Devey's ed.) 44, as to Perkin Warbeck.

⁴ Vol. 1 (ed. 1792), Henry II. c. 8.

⁵ Misc. Vol. 2, p. 259, with respect to the Countess of Flanders.

⁶ *Middle Ages* (7th ed.), vol. 1, p. 137; vol. 2, p. 474.

struction. Blackstone¹ speaks of Stephen of Blois, who was the grandson of the Conqueror, by Adelicia his daughter, as "claiming the throne by a feeble kind of hereditary right, not as being the nearest of the male line, but as the nearest male of the blood royal." And again, speaking of Henry IV., he says:² "He set up a show of two titles, the one upon the pretence of being the first of the blood royal in the entire male line, whereas the Duke of Clarence left only one daughter, Philippa, from which female branch, by a marriage with Edmund Mortimer Earl of March, the

house of York descended; the other, by reviving an exploded rumour * that Edmond Earl of Lancaster (to whom Henry's mother was heiress) was in reality the elder brother of King Edward I., though his parents, on account of his personal deformity, had imposed him on the world for the younger, and therefore Henry would be entitled to the Crown, either as successor to Richard II., in case the entire male line was allowed a preference to the female, or even prior to that unfortunate prince, if the Crown could descend through a female while an entire male line was existing." These authorities are conclusive to show that the "male line" must in construction of law mean a descent which entirely excludes females. Again, in *Co. Litt.*,³ after describing the Roman law, and declaring that the feudal regulations differed from it in almost every respect, it is remarked that the policy of most feudal countries has shown a great unwillingness to admit females into the fief; and in the same work it is said in a note,⁴ that feudal honours and offices of dignity descend to the males alone; and thus in the case of Lord Grey of Ruthyn, though the barony by writ, on account of its peculiar creation,⁵ was allowed to go to the daughter of the eldest son, the earldom of Kent, to which the holder of the barony had been created, went only to male heirs, and therefore on the death of the eldest son without male issue passed over to the son by a second marriage. That note is founded on the report of *Lord Grey de Ruthyn's Case* in *Collins*,⁶ where this subject is most elaborately discussed. In the course of the argument by Mr. Selden in that case,⁷ it is said,

¹ 1 Com. p. 200.

² 17 Ed. 191 a, n. VI. 4 (Mr. Butler's note).

³ 1 Com. p. 203.

⁴ 15 b, n. 3.

⁵ The doctrine thus assumed is now under consideration in Committee for Privileges in the claim of the Grandison Peerage.

⁶ Collins's Bar. 195.

⁷ Collins's Bar. 204.

speaking of the son of a daughter, "he cannot * derive him- * 880 self from the male line"; and Littleton,¹ where that rule is expressly stated, is referred to. That was also stated in Serjeant Rolls's argument,² and adopted on the certificate from the Herald's College.³ These authorities show the uniform and consistent use of the words by constitutional writers in the way now contended for by the appellant. The cases show the same use of them. In *Oddie v. Woodford*,⁴ the designation of "eldest male lineal descendant" was held to be inapplicable to a male person claiming in part through a female. That judgment was afterwards affirmed in this House.⁵ In *Bernal v. Bernal*,⁶ Lord Chancellor Cottenham adopted that rule of construction, and there "male children" in a Dutch will were held to mean "male descendants," and "male descendants" were held to mean, according to the English law, descendants claiming only through males, and his Lordship there expressly acted on the decision in *Oddie v. Woodford*. *Bernal v. Bernal* is all the stronger for this argument, because, like this case, it related to a gift of personal estate. Such is the general rule of interpretation, and unless the words of this particular will compel the application of a different rule it must govern the case now under appeal.

There are many difficulties that would attend the construction contended for by the respondents. The testator's brother, Charles Sayer, lived to within six months of the period of distribution. Suppose he had left a son, could it be said that Mrs. Bradley would take to the exclusion of that son merely because she would be nearer of kin to the testator, though the son of the brother would be the heir male of the family, and would be entitled to the arms? * Again, suppose Charles Sayer had left the * 881 son of a son, would Mrs. Bradley's daughter for a similar reason exclude him? If not, then it is plain that the words "nearest of kin," though they may aid in the construction of the will, cannot receive a force which will enable them to override the words "in the male line." The latter words are alone authoritative. The testator gave two lines. The "inheritor," whom he speaks of in the singular number, was to be found in one of those lines. How were they to be distinguished? into the male line and the female

¹ Co. Litt. 25 a.

² Collins, 210, et seq.

³ Collins's Bar. 249.

⁴ 3 Mylne & C. 584.

⁵ 3 Mylne & C. 625, et seq.

⁶ 3 Mylne & C. 559.

line. The "male line," such as the law designates it, was to be preferred. When that failed, but not before, the female line was to come in. Though a female might come of the male stock, yet she would not be in the male line, for the male line stops the moment a female comes in. *Oddie v. Woodford* clearly establishes that proposition.

The intention of the testator was not directed solely in favour of brothers and sisters, nephews and nieces, for in the memorandum, dated in April, 1831, he says: "I desire that a handsome marble monument shall be placed to my memory (close to that of my great-grandfather Valentine, and great-uncle Valentine Sayer, within St. Clement's church.") In another place he speaks of his chinaware and his pictures left him by his great uncle. His affectionate reference to these relations shows that he had in his mind all the members of his family, and that when he spoke of the "male line," he gave it that meaning which the law would ascertain for him, a meaning which would make it applicable among all the male members of his family, and would not restrict it to his brothers alone. The arms clause assists this construction, for the testator directs his arms to be borne by the inheritor, with "due differences." Now, differences can only be marked on the arms of males, for they signify of what house the bearer of the
 *882 arms is, and *indeed, correctly speaking, no female can
 "bear" arms, though she may exhibit them in a curtain, or a lozenge, to show to what family she belongs. Co. Litt.,¹ Berry's "Heraldry."² It is clear, therefore, that Mrs. Bradly could not comply with the words of the will, for she could not "bear" the arms, and as that is a condition of the inheritance, it shows that the devise is not applicable to a female inheritor of the property.

The testator's appropriation of the interest of the 10,000*l.* among his nephews and nieces, is one argument to show that he intended some other person rather than any one thus provided for to be the "inheritor" of his property. The use of that word proves that the "inheritor" was not intended to take as a purchaser. The testator's intention was to found a family, and in doing so he could not have meant to exclude a relative who bore the very name which he was so anxious honourably to perpetuate.

¹ Co. Litt. 27 a.

² Encyc. of Heraldry, tit. Differences.

Argument for the respondent. — The sole question in this case is, whether the appellant can be said to fill the character of “nearest of kin in the male line.” The contention on his part is, that no one can do so but a male, claiming through an unbroken series of males. This argument assumes to treat the will as if the words “male line” stood alone. That is not so, nor can those words control and override the words “nearest of kin.” The nearest of kin must first be discovered, and then among that class, the male line is to be preferred to the female line. According to the construction put on the will by the other side, there must be an intestacy, or else consequences must happen which it is impossible to conceive could have been intended by the testator. Thus, * according to the argument of the appellant, if there had * 883 been a brother and a sister of the testator, and both had died before him, the brother leaving a daughter, and the sister leaving a son, neither the daughter nor the son would have been entitled, for neither would have been strictly in the male line. Such a consequence would shock the common sense of mankind. Again, if the testator’s brother had a son and daughter, and the son had daughters, and the daughter had sons, the grandchildren would not be related to the testator, for the granddaughters would not be in the male line, and the grandsons could not claim through males. It may be that “male line” and “female line” are words constantly used to describe male and female descendants, but they do not mean an uninterrupted series of males or females. If they did, the Queen would not be in the male line, with regard to Geo. 3, for she certainly is not a male claiming through males, and as certainly she does not descend in the female line.

The words “male line” do not bear, even in the civil law, so narrow and restricted a construction as is now sought to be put upon them. In the “*Tractatus Illustrium*”¹ is a passage which shows that in order to exclude females from a limitation in the “male line,” the testator must use particular words, such

¹ Vol. 8, p. 124 (ed. Venice, 1684), *Tract. de Arte, Testandi*. “*Etsi testator substituat descendentes per lineam masculinam, neptis quod ex filio masculo ad hereditatem ex substitutione vocabitur; sed si testator neptem admitti nolit, remedium est, q’ita substitutionis verba concipiat, videlicet, substituat masculos per virilem sexum descendentes. Et notandum est quod si testator substituat lineam masculinam, intelliguntur etiam substituti agnati ex lineam transversali, quia indefinita equipollet universali. Sed si testator aliud sentiat, substituat masculos ex ipso testatore descendentes.*”

* 884 as he certainly has * not used here; and further, that "agnates" are included in the words "lineam masculinam," so that Mrs. Bradly being an agnate would be entitled. The authority of Cujacius is to the same effect.¹ That shows clearly that a granddaughter, the daughter of a son, would take as being "in the male line," so that on these authorities it is clear that the phrase, "male line," does not point exclusively to a male claiming through males. The words in the will are clear, "nearest of kin." The respondent, Mrs. Bradly, would answer that description, if those words stood alone; but then it is said that the other words qualify them. That argument, however, cannot be supported by authority. *Oddie v. Woodford*² and *Bernal v. Bernal*³ are not in point for the purpose for which they are now cited: the construction there adopted was with reference to the words of those particular wills alone. Here the person to take notwithstanding the word "inheritor" is a purchaser, which makes a difference with regard to the construction. On this point, it is observed in Jarman on Wills,⁴ "that in order to entitle a person to inherit by the description of heir male, or heir female of the body, it is essential not only that the claimant be of the prescribed sex, but that such person trace his or her descent, through the male or female line, as the case may be. Thus it is laid down by Littleton⁵ that 'if lands be given to a man, and the heirs

male of his body, and he hath issue a daughter, who
* 885 * hath issue a son, and dieth, and after, the donee die: in this case the son of the daughter shall not inherit by force of the entail; because whosoever shall inherit by force of a gift in tail male made to the heirs male, ought to convey his descent whole by the heirs male.' It is otherwise, however, in the case of gifts to the heir male, or female, by purchase, for if lands be devised to A. for life, and after his decease to the heirs male of the body of B., and B. have a daughter, who dies in his lifetime, leaving a son who survives B. (all this happening in the lifetime of A., the tenant for life), such grandson is entitled under the devise,

¹ Opera (ed. 1623), Consultatio XV. p. 363, tit. De Substitutione Præcaria. "Ita quod hereditates et successiones supradictorum testatorum ad lineam masculinam, illa existente, gradatim et successivè prout supra semper deveniant, ipsa autem linea masculina deficiente, ad femallas, non religiosas, propinquiores ex recta linea ipsorum testatorum descendentes."

² 3 Mylne & C. 584.

³ 3 Mylne & C. 559.

⁴ Vol. 2, p. 9.

⁵ Co. Litt. 25 a.

as a person answering the description of heir male of the body of B., he being not only the immediate heir of B. (though the heirship is derived through his deceased mother), but being also of the prescribed sex." After which he goes on to show that this rule was not impugned in either *Oddie v. Woodford* or *Bernal v. Bernal*, the decision in each case being confined to the context of the particular will. In *Woolmore v. Burrows*¹ the two estates were clearly intended to go together, and a construction different from that which was adopted would have defeated the clear intention of the testator, and the Court itself made a settlement in order to carry into effect the disposition of the will.

There are two canons of construction applicable to this case: the first is, that the intention of the testator, if it can be discovered, and is not in itself illegal, is to prevail over every thing; the next, that looking at the circumstances under which he used the words, a meaning must be given to them in accordance with the reasonable probabilities of the case, and words in themselves clear are not to be diverted from their clear and natural meaning merely because others are introduced which are not so easily intelligible. * Now here there is nothing in the will which pro- *886 hibits putting on the words their natural construction.

It is clear that being named in the will as one of the persons to receive a specific benefit, will not operate to prevent the person so named from taking a benefit intended for some one not ascertained at the date of the will: *Withy v. Mangles*,² *Pearce v. Vincent*.³ The latter of these cases is quoted in Jarman on Wills,⁴ where the substance of all the reports is given. T. Pearce, the devisee for life, with certain powers of appointment, which he never exercised, became by an unexpected course of events entitled to the ultimate gift of the testator's property, and he was not excluded from taking it in that character because he held it for life under a distinct devise. Lord Langdale there said: "It is argued that he ought to be excluded because the gift is to Thomas Pearce for life, and the restrictions put upon him in his character of tenant for life are wholly inconsistent with an intention on the part of the testator to give him the absolute power over the estate. But the

¹ 1 Sim. 512.

⁴ Vol. 2, p. 59.

² 10 Clark & F. 215.

³ 1 Crompt. & M. 598, 2 Mylne & K. 800, 2 Scott, 347, 2 Bing. N. C. 328, 2 Keen, 230.

testator could not have had in his view and knowledge that the ultimate gift, which is limited to a person unascertained at the date of his will, would go to Thomas Pearce. The argument derived from intention does not apply in this case; and I am of opinion that, upon the true construction of the will, Thomas Pearce took under the ultimate limitation, not because he was the individual person intended by the testator to take, but because he answers the description of the person to whom the estates are ultimately given." That was a decision of several Courts of law and equity, and establishes that a person may take under a * 887 general limitation, notwithstanding an * inference against him, arising from the circumstance that he is specifically included in a distinct class of devisees. The argument against the respondent, drawn from the fact that she is one of the persons specifically named to take a direct benefit under the 10,000*l.* clause, therefore fails.

Then as to the name and arms clause: it is not proposed to construe the will by any instrument subsequent to the will, but both may be looked at for the purpose of ascertaining what was, throughout, the intention of the testator. Take the words in both the will and codicil, and it is plain that the testator intended to ask for a grant of arms that could be borne by him and his descendants, or the descendants of his father, in other words, his brothers and sisters, nephews and nieces, but not one that could be borne by any other and more distant relatives. That grant he obtained, after the date of his will, and in that particular form; and that shows in a very clear manner what was his intention with regard to the property, for the arms were especially to be borne by the "inheritor" of the property; and the circumstance that the inheritor of the property might not be a male was provided for by the special directions as to taking the surname. The arms clause directed that the "inheritor of the capital shall bear and use the arms, with due differences, which may previous to my death have been assigned to me." It has been contended that this would exclude a female inheritor; but Berry's "Heraldry" shows that not to be so. Females may not bear crests, but may use the coat armour of their families; and Berry shows that in that way they may mark differences. He says:¹ "Differences or brisures are certain additaments to coat armour, whereby something is added

¹ Dict. of Heraldry, tit. Differences.

or altered, in order to distinguish the younger families from the elder." That is * not exclusively applied to males, but * 888 to families ; and the difference being marked on coat armour which belongs to a family, a female may use it to designate her family.

The claim of the appellant is not sustained, and the judgment of the Court below must be affirmed.

Mr. R. Palmer, in reply. — The authorities cited lay down principles which apply beyond the particular wills then under consideration. If the testator meant that a descendant of his father, whether of the male or female line, should be the "inheritor," it would have been easy to say so. He has said what must be taken to be the reverse ; he has excluded females if a male line can be found. The sole question is, not whether the appellant has proved his title, but the House must consider who is entitled, and must fix on the particular person. In the first instance, the words of the will plainly describe a person who, like the appellant, is male, of the male line. That description is not controlled by any thing else. It may be that "nearest of kin," if those words stood alone, would be in favour of the respondent, but they do not stand alone, and the words "male line" qualify and control them.

THE LORD CHANCELLOR proposed the following question for the consideration of the Judges : "Admiral George Sayer duly made and published his will and codicil, and a memorandum thereto, as set out in the appellant's case ; and soon after his decease in 1831, the same were duly proved by the executors therein named, and all his debts and funeral and testamentary expenses were duly paid by the executors out of personal estate of the testator not specifically bequeathed ; and a large surplus personal estate not specifically bequeathed, amounting to * above * 889 20,000*l.* remained in their hands, and was by them duly converted into money, and invested in the purchase of three per cent. Bank annuities, pursuant to the trusts of the said will and codicil.

"At the end of twenty-one years after the testator's decease the executors duly assented to the bequest of the gold medal for Java, mentioned in the codicil, which medal they had retained, and then still had in their hands. The appellant de-

manded of them the medal, but the executors refused to deliver it up to him.

“ Can he maintain an action for the same ? ”

27 June.

Mr. Justice Coleridge delivered the opinion of the Judges. — The learned Judges who heard the argument have deputed me to deliver their unanimous opinion in reply to your Lordships' question.

The appellant can only maintain an action for the medal by showing that at the end of twenty-one years after the decease of the testator he fulfilled the terms used by the testator in describing the object of his bounty, who is to be the nearest of kin to him in the male line in preference to the female line.

The twenty-one years expired on the 29th April, 1852, and at that time the appellant was not the nearest of kin to the testator, as he was his first cousin only, and there was a sister of the testator, and a nephew (a sister's son) then surviving. The question then turns upon the meaning of the words “ in the male line in preference to the female line,” as used by the testator in his will and codicil.

By the will the testator directed the dividends arising upon his stock to be distributed amongst his brothers and sisters and nephews and nieces in certain proportions during their respective lives, and then he directs that at * the death of the last survivor of his nephews and nieces the capital is to be the property of “ the then nearest of kin to himself in the male line, in preference to the female line,” upon condition of the inheritor assuming the surname of Sayer only, if not of that surname, and bearing and using, according to the law in such case enacted, the arms which may have been at any time before his death assigned to him (the testator).

By the codicil to his will he leaves the dividends upon 10,000*l.* stock only, to be distributed amongst the survivors of his brothers and sisters and nephews and nieces, and directs that the residue shall accumulate for twenty-one years after his death, at the end of which period the whole capital is to go to his “ then nearest of kin in the male line in preference to the female line, under the conditions and restrictions as in his will are set forth,” the said inheritor first paying therefrom the interest of 10,000*l.* consols

“to the survivors of his brothers, sisters, nephews, nieces, until the death of the last survivor of them, in the proportions prescribed by his will in their behalf and in behalf of their children, if any, until the death of the last survivor.”

By a memorandum appended to the codicil and admitted to proof, he directed that his gold medal for Java, and badge of the order of the Bath, and some other articles, should be preserved to descend with the patent and painting of his armorial bearings to the inheritor thereafter of his capital property, and to the descendants who might from time to time succeed thereto.

The object of the testator seems to have been to found a family of the name of Sayer, and with the coat of arms which might be granted to him; and with this view he appears to have considered his personal estate in the same light as if it had been real, and to have intended that it * should go to some one indi- * 891
vidual devisee. But we confess ourselves unable to form an opinion with any thing like confidence as to the individual who fulfils the terms of the devise. It is, indeed, far easier to form an opinion as to a person not being entitled than to fix upon the person who is entitled.

For the purpose of arriving at some conclusion, it is material to consider the state of the testator's family at the respective dates of the will and codicil. The will was dated in 1816, and the codicil on the 29th of March, 1831. At each of those dates there were living two brothers and six sisters of the testator, all of whom survived him and were his next of kin. If they had all survived the twenty-one years after the death of the testator, who would have been entitled? All were equally near of kin, and all in one sense were in the male line, for all were the children of the testator's father. But where all were equally near of kin, but some males and others females, the terms used would show that the testator meant to prefer the males to the females. It is clear that he did not mean to exclude his female next of kin altogether, for the words are to my nearest of kin in the male line in preference to the female line.” It may be that the testator, by the terms he used, intended that if there were two in equal degrees, one a male and the other a female, the male should be preferred. Such a construction would however limit the meaning of “the male line” to be of the male sex. But unless that be the true meaning, or by the words “in the male line in preference to the female line”

the testator, who had himself no children, meant the next of kin on the father's side in preference to the mother's, it is difficult to give effect to that which seems to be the primary qualification of the object of the testator's bounty, that he or she should be "the nearest of kin to himself."

* 892 * By the terms "nearest of kin in the male line in preference to the female," it is hardly to be supposed that he limited the objects of his bounty to his nearest of kin in the male line in the strictest sense of the *agnati* of the civil law. When the codicil was made the testator was fifty-seven years old. His two brothers were both bachelors, and as they appear by the pedigree to have immediately followed the testator in date of birth, and as five sisters were born after them, they probably were not many years younger than the testator himself, and he can hardly be supposed to have contemplated any children of theirs becoming entitled under his will. Two of his sisters were married and had children of both sexes; his nephews and nieces; did he mean to exclude them? If he did, it seems extraordinary that he should not have made some mention of such an intention, and of the property going to the cousin in the event of his brothers dying without leaving a son or sons before the expiration of the twenty-one years. It may be said that the clause in the codicil directing that "the inheritor was to pay the interest of 10,000*l.* to the survivors of the testator's brothers, sisters, nephews, nieces, until the death of the survivor of them," favours the opinion that he did mean to exclude his sisters and their children; but as his brothers are mentioned also, whom in any view of the case, he could not have intended to exclude, he may have intended the payment to be made to such of the survivors of the enumerated persons as did not take the capital.

If the testator had intended that the object of his bounty should be an agnate, however remote his kin might be, provided he were an agnate in the proper meaning of the term, he would hardly have introduced the words "in preference to the female line,"

which show that neither females nor what he calls the female line were to be * excluded, though the preference is to be given to what he calls the male line. If an agnate were intended, the necessity for the clause requiring the assumption of the name of Sayer could only have arisen under such peculiar circumstances as were unlikely to have occurred to his

mind, and its introduction therefore would be highly improbable ; but it might be applicable at once, or under very probable circumstances, to a sister or her children taking.

The clause directing the inheritor to take the arms of the testator, is said to present some difficulty in the case of a female inheritor. A female, perhaps, cannot be capable of bearing arms, in the strict sense, but females may, as stated in Coke Littleton, 27 a, express the arms and armouries belonging to their families in a lozenge whilst unmarried, and impale them with their husband's when married. But although that clause may not be an insuperable objection to a female being the first taker, it certainly does to some extent indicate an intention on the part of the testator that the first taker should be a male.

But however this may be, the grant of arms itself is hardly consistent with the claim of the appellant. The grant is dated in 1821, after the making of the will, and before the making of the codicil. The grant is of certain armorial ensigns to be borne by the testator and his descendants, or "by the other descendants of his late father, Benjamin Sayer." At the date of the codicil the grant of arms had been made, and by reference to the will and the codicil, the person taking the capital stock is to bear and use, according to the law in such cases enacted, the arms, with due differences, which had been assigned to the testator ; and by the memorandum, the Java medal is to go with the patent and painting of his armorial bearings to the inheritor of his capital property, and the descendants * who might succeed thereto. It * 894 is further to be observed, that the limitation in the grant of arms "to the descendants of the late father, Benjamin Sayer," is stated in the recital to have been made at the testator's own request. This is, no doubt, exceedingly strong, almost conclusive to show that whatever ambiguity of expression the testator may have used, he intended some one of the descendants of his father to be the object of his bounty, he having at the time brothers, sisters, nephews, and nieces, descendants of his father ; and that he did not propose, when he used the terms "nearest of kin in the male line in preference to the female line," that in case his brothers died without sons, the other descendants of his father, male and female, should all be excluded, and the Java medal, patent of arms, and capital stock go to a cousin, a descendant of his grandfather, of whom he had made no mention whatever in his will.

We forbear to make any commentary on the cases that were cited, for as the construction of terms used in a will must depend upon the context and surrounding circumstances in each particular case, a decision in one, in which the terms used, the context, and the circumstances are not the same, can hardly assist in coming to a conclusion as to the probable meaning of terms which are capable of different meanings, according to the intention and understanding of the person using them. Even arguments general in their form are very often so affected by the surrounding circumstances which suggest them, and to which they are applied, that to apply them to a different state of facts is dangerous, and likely to lead to an erroneous conclusion.

Upon the whole, it appears to us that the appellant cannot maintain an action for the Java medal.

* 895 *THE LORD CHANCELLOR. — My Lords, the noble and learned Lords, who, with me, heard the argument in this case,¹ are not now present, and it is of course extremely important that they should concur in whatever decision I may advise your Lordships to come to. Therefore, all that I can now do is, after thanking the learned Judges for the very full manner in which they have investigated this subject, without expressing any opinion of my own as to how far I do or do not concur in the opinion they have expressed, to move that this opinion be printed.

July 24.

THE LORD CHANCELLOR. — My Lords, the question in this case arises upon the construction of the will of a gentleman of the name of Admiral George Sayer, who made his will in 1816, and died so long ago as the year 1831. The will is in these terms — [his Lordship read it.]

At the time the testator made this will in 1816, and at the time of his death in 1831, there were living his eldest sister Judith, whom he describes as being amply provided for ; his two brothers, Charles and Benjamin, who were both bachelors as he himself was, and whom he calls his " dear brothers," and appoints his executors ; three unmarried sisters, Mary, Susanna, and Caroline ; and two married sisters, Elizabeth, the wife of William Boys, and Jane, the wife of Stephen Bradly. Mrs. Boys had issue four children,

¹ Lord Brougham and Lord St. Leonards.

three sons and one daughter, and Mrs. Bradley had issue one son and four daughters. That was the state of the family.

According to the will and codicil, taken together, there was to be an accumulation of the property for the person who would eventually be entitled to it, for a period of twenty-one * years. * 896 That period expired on the 29th of April, 1852, being twenty-one years from the date of the testator's death. The question was, who was entitled to the property under the description of the "then nearest of kin" (that is, nearest of kin at the expiration of twenty-one years from the death of the testator) "in the male line, in preference to the female line." Both the brothers, who were appointed by him as executors, had died previous to that time, and all the sisters had died except one of the married sisters, namely, Jane Bradley. The state of the immediate family at that time (I mean by the immediate family, his brothers and sisters, he having died a bachelor) therefore was, that there were living, the married sister, Jane, the wife of Stephen Bradley, who had issue five children, namely, four daughters and one son; and the children of the other married sister of the testator, Elizabeth Boys, who herself had died, but had left issue four children, three of them sons. There was therefore of the testator's father no lineal male descendant claiming through males. There had been sons and daughters of the testator's father, but all were dead except this one married daughter. There were sons of these daughters, but neither of the testator's brothers had ever married, and consequently never had any issue.

The present appellant, Captain George Sayer, was cousin german of the testator, being a son of Terry Sayer, who was the elder and only brother of the testator's father.

The question is, who was entitled to this large accumulated residue, under that description of the "nearest of kin in the male, in preference to the female line."

That being the state of things, the executors (or at least those who had come in their places, for both the executors were dead) found that they could not safely act, and in consequence of that, on the 2d of September, 1852, the * executors filed a * 897 bill, praying for the directions of the Court, and for a declaration of the Court, whether, upon the true construction of the will and codicil, the defendant Jane Bradley, who was the sole surviving sister of the testator, or her husband in her right, is the

individual entitled to the residuary estate of George Sayer, subject to the conditions and requisitions in the will and codicil, or whether William Boys the younger, or any and what other person was entitled thereto; or if the Court should be of opinion that, in the events which had happened, the trusts, by the codicil of the testator declared, concerning the accumulated fund, were incapable of being performed.

The question is one of very great nicety and difficulty. It came on to be heard before Vice-Chancellor Wood, on the 24th of January, 1853. He came to the conclusion that the defendant, Jane Bradly, as the sole surviving sister and sole next of kin of the testator, was the party entitled, and he decreed accordingly. Against that decree there was an appeal by the present appellant, George Sayer, which the Lord Chancellor referred to the Lords Justices, the appellant alleging that although Jane Bradly was the sole next of kin in the female line, the sole next of kin in the male line was himself, who was cousin german, being the only person claiming relationship to the testator as male through a pure line of males. That question came on to be argued before the Lords Justices, and they, by their decree, on the 25th of May, 1853, affirmed the decree which Vice-Chancellor Wood had so made.

George Sayer being dissatisfied with this decision, and considering that he, as the sole pure male representative of the testator, was the person entitled, brought the matter by way of appeal to your Lordships' House, and the case was heard at very considerable length just before the close of the last session of Parliament. At that time there were * present my two noble and learned friends, Lord Brougham and Lord St. Leonards, who are not now here, and after having heard the case, on considering the matter with them, I came to the conclusion that in truth this was a purely legal question, for although it came to be decided in a Court of equity by reason of the nature of the funds to be administered, the sole question was, what was the construction of that instrument, and that a similar question might arise as to some of the chattels which were given by the same instrument, and that this being a purely legal question, and one of great nicety, it would be desirable that your Lordships should have the benefit of hearing what might be the opinion of the learned Judges upon the subject. Though your Lordships would

not necessarily be bound by their opinion, it would be a very important guide in enabling your Lordships to come to a correct conclusion. Accordingly your Lordships declined giving judgment in this case in the last session of Parliament, and the matter was this session reargued by one counsel on a side in the presence of the learned Judges. After hearing the case argued, your Lordships put to the Judges this question. [His Lordship read it.]

That question having been put to the learned Judges, they delivered their opinion, through Mr. Justice Coleridge, coming to the conclusion that such action could not be maintained upon the ground that the appellant was not the person answering to the description of "nearest of kin in the male line, in preference to the female line." The learned Judges stated, as I have myself all along felt, that it would be much easier in this case to say of any particular person that he was not the person designated than to say who was the person designated; but they come to the conclusion (and this is the only question before your Lordships), that George Sayer is not the person designated.

*Between those who claim against George Sayer, namely, *899 Mrs. Bradly, and the children of her deceased sister, there might be questions of very great nicety and difficulty, even if the claim of the present appellants should be out of the question; but those conflicting claims are not at present before your Lordships. All that you have to determine is, whether George Sayer, the appellant, is or is not the party entitled.

My Lords, the appellant, in order to succeed, must satisfy the House that on the 29th of April, 1852, he was the person answering the description of the "nearest of kin in the male line, in preference to the female line." Now in the first place I must observe, he certainly does not fulfil all which is required to bring himself in terms within that description, for he was not next of kin, nor one of the next of kin. It is a wholesome canon of construction to give effect, if possible, to every word in the will or other instrument which is to be construed, and that rule ought not to be departed from, unless it is apparent that by adhering to it we should be defeating the intention as collected from the context. The only ground on which the appellant rests his claim is, that the person designated was to be nearest of kin to the testator in the male line, and that, it was argued, must mean male nearest

of kin claiming through an unbroken line of males, and so that as there was not at the time when the gift took effect any male descendant of the testator's father, claiming through such an unbroken line of males, it became necessary to resort to the descendants of his paternal grandfather. And as the appellant was on the 29th of April, 1852, the only child of the testator's only paternal uncle, it was argued that he was the next of kin to the testator in the male line according to the fair construction of the will.

I do not think that this reasoning would have been satisfactory, * even if the language of the codicil had been simply that the residue shall remain to be disposed of towards my then nearest of kin in the male line. But that is not the language used. The words are "towards my then nearest of kin in the male line, in preference to the female line." This shows that the female line was not in all events to be excluded, but only that it was to be postponed. It was a possible case that at the end of the twenty-one years there might be no descendant claiming through any paternal ancestor of his father. Unless we hold that in that case relations claiming through females might be let in, we must be prepared to say that there would have been an intestacy, a conclusion at which I think it impossible to arrive. But female relations, or relations claiming through females, can only be let in by construing the will as giving to the male line, not exclusively, but only preferentially, that is, by reading the words, "in the male line in preference to the female line," as if written in a parenthesis explanatory and restrictive of the prior words, "my then nearest of kin." Probably the testator had not himself any perfect notion of what he was expressing, or meant to express. If, for instance, at the period of distribution he should have had a nephew, the son of a sister, and a niece, the daughter of a brother, and all his brothers and sisters, and his nephews and nieces, should then be dead, he probably had no well-defined intention as to which of them should take the property. But that is not the point now to be decided. What we have to say is, whether in such a case it can be collected from the will and codicils that he meant his cousin german or agnate cousin to take to the exclusion of his nephew and niece. I think this would be a most violent presumption against the probabilities of the case, and at which we cannot arrive without reading the words, "my then nearest of kin," in a sense * 901 different * from that which is their *prima facie* legal im-

port. I have said that such a presumption would be contrary to all the probabilities of the case. And for that I do not rest merely on the general ground that a man is likely to desire that his property should go to his own brothers and sisters, and their children, rather than to his cousins; but this will seems to me to furnish abundant grounds for showing that this testator had in view the descendants of his own parents, and of them alone, though if they had all failed before the end of twenty-one years, the language used by him would have been sufficient to carry the property to collaterals.

In the first place, it is worthy of observation that there is not in any part of the will or codicil, or of the memorandum proved with them, the smallest allusion to any collateral relative as an object of his bounty, though he does make mention of a great-uncle as a relation, who had left him some ancient china. Surely if he had contemplated so unusual a disposition of his property as that it should go to cousins in preference to brothers and sisters and their descendants, he would have made some allusion to such an intention, more especially as all the language and provisions both of the will and codicil are indicative of kindly and affectionate feeling towards his brothers and sisters, and their children. By his will he appoints his dear brothers his executors. He explains, as the reason for his giving only a small legacy to his dear sister Judith, that she was already well provided for, and he distributes the whole of the income of his property among his brothers, sisters, nephews, and nieces while any should be living. By his codicil he restricts what he had given to a sum of 10,000*l.* consols, with a view of accumulating the residue for the person who should become entitled under the clause now in dispute. But he expressly alludes to * the more independent circumstances of his * 902 brothers, and to the large sums he had given annually to his sisters, as the reason for the alteration he was making. So that it may fairly be inferred that his affection towards his brothers and sisters, and the children of his married sisters, remained unabated.

But, secondly, not only is there no mention of any cousin, but there is a provision in the memorandum proved with the codicil, which seems to me to furnish strong evidence that the testator never contemplated the probability of his property going to any one not a descendant of his father. By that memorandum he disposes of a gold medal and a gold snuff-box, presented to him by

the King of the Netherlands, and of several other chattels which he evidently prized highly, and which he gives to his two brothers, whom he had made his executors, to be preserved by them, to descend, with "the patent and painting of my armorial bearings, to the inheritor hereafter of my capital property."

By "the patent of my armorial bearings," the testator evidently intended the grant of arms which had been made to him in the year 1821. That grant, after reciting the services rendered by him as a naval officer in the Indian seas, and that, in testimony of his Majesty's approbation thereof, he had received a gold medal, proceeds to state, that he, that is, the testator, "being desirous of transmitting to his descendants the remembrance of this especial mark of the royal favour, by bearing in his armorial ensigns some distinctions allusive to his services, requested the favour of his Lordship's" (that is, the Earl Marshal's) "warrant for our granting and assigning such armorial ensigns accordingly, to be borne by him and his descendants, and by the other descendants of his late father, Benjamin Sayer, sometime collector of the cus-

* 903 toms at Deal, * deceased, according to the laws of arms.

And forasmuch as the said deputy to the Earl Marshal did by warrant under his hand and seal, bearing date the 16th day of November instant, authorise and direct us to grant and assign such armorial ensigns accordingly."

It is plain from this document that the grant of arms was made upon his application to extend to the descendants of his late father, but not to any others. And when therefore he, by the memorandum proved as a codicil, directed that the patent of the armorial bearings should go to the inheritor of his capital property, he must surely have contemplated that that inheritor would be a person who was to bear the arms, which would not be the case if the property was to go to persons not being descendants of his father. He could hardly have desired that the parchment grant of arms should go as an heirloom to those who would not have any right to bear them. I do not forget the argument that females cannot, in the strict heraldic sense, bear a coat of arms, they can only impale them with the arms of their husbands when they marry, or express them under a curtain, or in a lozenge when they are single, to indicate what family they are of. But these are technical niceties of which we may well suppose the testator to have been ignorant. The inference from his language is, that he thought by the grant of arms

he had obtained a right in which all the inheritors of his capital property would participate. If it be said that he must have known that, in the event of all the descendants of his father failing before the end of the twenty-one years, the property must go to a collateral, who could not use the arms, I answer that, with two married sisters, one of whom had five and the other four children living, even supposing that he did not contemplate the possibility of there being issue of his brothers and unmarried sisters, a complete failure of issue * of his father within twenty-one years was * 904 so unlikely, that in all probability it never presented itself to his mind.

The result therefore of my consideration of this case is, that the appellant has failed to make out any title to this property. I come to this conclusion because I think the person to take must show himself to be what the appellant is not, one of the nearest of kin of the testator at the end of twenty-one years from his death. It is not necessary to consider whether by "nearest of kin" we are to understand strictly nearest of kin, or those who would take as such under the Statute of Distributions, for the appellant does not bring himself within either class; and if we were to depart from the strict language which the testator has used, and give the property to a person who, though a male agnate, did not answer the full description of those whom the testator pointed out as the objects of his bounty, we should, as I think I have shown, be acting against, not only what his intentions were likely to be, but further in violation of intentions reasonably deducible from the context of the instruments themselves.

The Vice-Chancellor first, the Lords Justices afterwards, and lastly, the learned Judges, whose assistance we had, all arrived at a conclusion adverse to the appellant. In that opinion I concur, and therefore shall move your Lordships to affirm the judgment below, and to dismiss the appeal. I much regret that my noble and learned friends, Lord Brougham and Lord St. Leonards, who heard the case with me, are prevented by indisposition from attending here to-day, and delivering their opinions; but I have been in communication with both of them, and they both desire me to express their opinions that the appellant is not entitled. Lord St. Leonards, in his letter to me, adds, that his opinion does not turn upon the mere circumstance that the appellant is not the nearest of kin. I rather * think that I should have * 905

thought that fact alone sufficient to exclude him. But the other circumstances to which I have adverted have also had great weight with me.

In a case of such grave difficulty the appeal must be dismissed without costs; and the respondents must have their costs out of the fund. In this direction your Lordships will be following the course taken by the Lords Justices.

Decree affirmed.

Lords' Journals, 24th July, 1856.

COLYER v. FINCH.

1856. July 15, 17, 18, 24.

THOMAS COLYER, *Appellant*.

EDWARD FINCH, *Respondent*.¹

*Mortgage Notice. Priority. Postponement, Fraud, or Negligence.
Sale for Payment of Debts and Legacies.*

A Court of equity does not restrict the protection it will afford a purchaser for valuable consideration without notice, to a case in which he has got the legal estate.

Where there is a general charge of debts, but no legal estate is given, the executors may have implied authority to convey the legal estate in order to raise the money to satisfy the charge; but where there is a devise of the legal estate to a particular person, and the estate is charged with payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title.

Semble, that where a devisee of a real estate charged with payment of debts sells the real estate, the purchaser is not bound to inquire (unless special circumstances call for such an inquiry), whether the money is applied in the payment of debts, or whether the sale was intended for that purpose.

A first mortgagee having the legal title is not to be postponed to a second, merely because he has not possessed himself of the title deeds of the estate: he can only be postponed where he has been guilty of fraud or gross negligence.

* 906 * If an estate is given to a devisee charged with the payment of legacies, and he mortgages the estate to one person and afterwards sells it to another, the purchaser will stand in the place of the legatees, but will do so bound in equity to make good the mortgage debt.

¹ Clarke v. Hart, 6 H. L. Cas. 649; Montefiore v. Browne, 7 H. L. Cas. 253; Smith v. Kay, 7 H. L. Cas. 755.

THE Rev. J. Kenward Shaw Brooke, by his will, dated 24th August, 1839, devised all his estates (of which he was seised under a will dated in 1789), unto Robert William Shaw and his heirs, to the use of such persons as the testator's nephew, Sir J. Kenward Shaw, should by deed, &c. appoint, and until such appointment, and in default thereof, to the use of the said Sir J. K. Shaw for life, remainder to Sir J. K. Shaw, his heirs, &c. for ever; and Robert W. Shaw and Sir J. K. Shaw were appointed executors. The testator died in December, 1840, and in February, 1841, the executors proved the will. The property in question was at that time subject to an annual rent charge, created in April, 1822, for the sum of 200*l.*, payable to Frances Ann Shaw for life, which rent charge was secured by a term of one hundred years. It was also subject to three several legacies of 2000*l.* each, payable, with interest at four per cent. at the expiration of twelve calendar months from the death of Dame Theodosia Margaret Shaw, widow. Sir J. K. Shaw, in July, 1842, borrowed from the respondent a sum of 3500*l.*, which was secured by a mortgage on certain of the devised lands, &c., being two farms called Hook's Hill and Weaver's, situated at Southfleet, in Kent. By indenture, dated 7th July, 1842, made between Sir J. K. Shaw of the one part, and the respondent of the other part, the will of the Rev. J. K. S. Brooke was recited, together with his death, the probate of the will, the seisin of Sir J. K. Shaw under it, the agreement for the loan, &c., and it was witnessed that, in consideration of the sum of 3500*l.* by the respondent paid to him, Sir J. K. Shaw, he in execution of the power * given him by the will, appointed * 907 the hereditaments therein named, &c. to the uses therein-after expressed, and that for the considerations aforesaid Sir J. K. Shaw by the said indenture, made in pursuance of the Act of the 4 Vict. c. 21, for rendering a release effectual for the conveyance of freehold estates, did grant, &c. the two farms called Hook's Place and Weaver's, in Southfleet, in the county of Kent, then in the occupation of Thomas Wells, to secure repayment of the said 3500*l.*, with interest at five per cent. This indenture was prepared by Mr. John Hayward, who was at that time a solicitor in considerable practice at Dartford, and was the solicitor for Sir J. K. Shaw, and who in this transaction acted likewise as the solicitor for the respondent. On the respondent paying over the 3500*l.* he received from J. Hayward the mortgage deed, the will of 1789, the

will of 1839, and some other papers which J. Hayward represented as constituting a perfect security for the loan. In fact, however, though Sir J. K. Shaw was really entitled to both moieties of the estate, and had always been in possession of them, the papers delivered showed only a title to one moiety. There were deeds of 1750 and 1789, which made the title to the whole complete, but which were never delivered to the respondent. The interest on this mortgage was regularly paid through the hands of J. Hayward up to the 7th of January, 1849.

In 1846, J. Hayward, still acting as the solicitor for Sir J. K. Shaw, obtained from the appellant a loan of money on the deposit of the title deeds then in Shaw's possession, one of which was the deed of 1789, which, with the will of 1789, would have made the title complete.

Lady Theodosia died in October, 1847, and in 1848, the three legacies of 2000*l.* each, charged on the property (of which the farms at Southfleet formed part), became payable. Other * 908 loans were obtained by Sir J. K. Shaw, * and in all the transactions relating to them John Hayward acted as his solicitor. Among these was a loan made to Sir J. K. Shaw by Mr. William Webb Hayward, a trustee for a person named Cooper, and thereupon an indenture, dated 20th May, 1848, was executed by Sir J. K. Shaw, by which the premises at Southfleet, and others not comprised in the plaintiff's mortgage, were conveyed to W. W. Hayward, with a power of sale, for the purpose of paying the three legacies of 2000*l.*, and for the other purposes mentioned in the said indenture. The loan made by the appellant was paid off, and he delivered up to W. W. Hayward the deeds which had been deposited with him.

On the 16th of February, 1849, W. W. Hayward put up for sale by auction the hereditaments comprised in the last-mentioned indenture, and the first lot contained the lands of Hook's and Weaver's farms, which lot realized the sum of 8200*l.*, and the others made up therewith the sum of 13,670*l.*, or more than double the amount required to pay the legacies, with the interest due thereon. The lot one was at first bought by the respondent's present solicitor, without his being aware of the existence of the mortgage of the 7th July, 1842, but it was subsequently re-sold, and Mr. Wells, the tenant of the farms, became the purchaser, and had since transferred his rights as such to the appellant.

Mr. R. Shaw (since deceased) and Sir J. K. Shaw, as executors of the will of 1839, and Sir J. K. Shaw, in his own right, joined in executing the conveyance upon the sale.

In June, 1852, the respondent filed his bill against Sir J. K. Shaw (then and now out of the jurisdiction), and against the appellant, which set forth the above facts, denied that he had knowingly or wilfully left the title deeds in the hands of J. Hayward, and alleged that he * had taken what he believed * 909 to be a valid and complete security for his advance. The prayer of the bill was, that an account might be taken, that the defendants might be ordered to pay what should be found due, or that the appellant might be foreclosed, or might be prevented from setting up in any action at law at the suit of the respondent, the term of one hundred years created in April, 1822.

The appellant put in his answer, and insisted that the respondent did know, or but for gross negligence might have known, all the various dealings which took place with the premises between the date of the respondent's alleged security and the completion of the sale to the respondent. He denied that J. Hayward acted as his solicitor, but admitted that that person had prepared the deeds.

In September, 1852, Thomas Colyer, having put in his answer to Finch's bill, filed a cross bill against Finch, by which he prayed that Finch's mortgage might be declared invalid, or if not invalid, that it was not entitled to priority over his (T. Colyer's) purchase, and that Finch might be ordered to convey to him, or might be restrained from taking any proceedings at law against him, to obtain possession of the said farms and premises.

Finch put in his answer, and the causes went to issue, when evidence was given of the facts above stated; and with reference to the mode in which the mortgage transaction took place, the respondent stated in his affidavit as follows: "I directed Hayward to prepare a proper mortgage deed, and he did thereupon prepare the indenture, dated 7th July, 1842, marked A. About the latter end of the month of June, or the beginning of July, 1842, the said John Hayward desired me to be ready with the said 3500*l.* by the then following 7th day of July, and I accordingly applied to * Mr. Frederick Charles Chappell, of No. 15 Angel * 910 Court, in the city of London, stock broker, to sell for me so much of a sum of 4076*l.* 19*s.* 3*d.* new 3½ per cents then standing

in my name as would produce the sum of 3500*l.* clear; but the said Mr. Chappell informed me that he could not complete such sale until the 8th day of July. That on the said 8th day of July I went, in the first instance, to the Adelaide Hotel, London Bridge, where I was to meet Mr. Hayward, by appointment, and that I there saw the said Mr. Hayward, and the said defendant, Sir John Kenward Shaw, in conference together, and that the said John Hayward then informed me that he had arranged every thing with the said Sir John Kenward Shaw, and, by his, the said John Hayward's desire, I then went to the office of the said Mr. Chappell, and sold 3517*l.* 14*s.* 3*d.*, portion of the said sum of 4076*l.* 19*s.*, which produced, after deducting brokerage, the sum of 3500*l.* exactly. That the said Mr. Chappell handed me over the proceeds of such sale in notes of the Bank of England (that is to say), three notes of 1000*l.* each and one note of 500*l.* That immediately I received the said 3500*l.* I went direct from the office of the said Mr. Chappell to the Adelaide Hotel, London Bridge, where the said Mr. Hayward had appointed to meet me. That I met Mr. Hayward at the said hotel, and he then informed me that Sir John Kenward Shaw had just left, but that he, Mr. Hayward, should see him that evening, and that I might leave the money with him. That I did accordingly then pay to Mr. Hayward the said four notes for 3500*l.* That on the 11th of the said month of July I received from Mr. Hayward a letter, of which the following is a copy: 'Dartford, Sunday, 10th July, 1842. Dear Sir, — I was too late for Sir John Shaw on Friday, but I remained in London and concluded the business yesterday afternoon. I have the *911 papers, and will bring them up the first day I am in *London. I did not get away yesterday until half past six, and I could not manage to get to your house. Yours very truly, John Hayward.' That a few days afterwards the said John Hayward called upon me, and delivered to me the said indenture, marked A." (that is, the mortgage from Sir John Kenward Shaw), "together with the several documents now produced, and shown to me marked B. C. D. E. and F., and the said paper writing marked G.; and he also delivered to me at the same time a parchment writing, which, for the reasons hereinafter stated, I have not now in my possession, and the nature of which I do not accurately know, but I believe that it was dated somewhere about 1678, and that Brazenose College, Oxford, was one of the parties to said parch-

ment writing. That the said John Hayward then informed me that the documents so delivered to me constituted, with such parchment writing marked A., a perfect security for my said advance; and I say that I implicitly believed such statement of the said John Hayward. That I was then, and am now, totally unacquainted with documents of title to landed property and legal forms, and quite incompetent to form an opinion upon the question, whether the said documents so delivered to me in fact constituted the title deeds belonging to the said mortgaged premises, and that, under these circumstances, and having no reason whatever to doubt or question the perfect respectability of Mr. John Hayward, I relied upon the representations so made to me as aforesaid by Mr. John Hayward, and entirely believed that the documents delivered to me, with the said parchment writing marked A., were in truth and fact the title deeds of the said premises. That I never knowingly or wilfully left the said title deeds, or any of them, in the hands or custody of the said Sir J. Kenward Shaw." There was no other direct evidence on this point.

*The causes were heard together before the Master of *912 the Rolls, who, by a decree dated the 18th July, 1854, directed Colyer's bill to be dismissed with costs, and as to the bill filed by Finch, directed an account for principal and interest due on the mortgage, and that upon Colyer paying within six months what should be so found due, Finch should reconvey, but that otherwise Colyer should be foreclosed.¹ The appeal was brought against this decree.

Mr. Rolt and *Mr. C. Hall* (*Mr. Mott* was with them) for the appellant. — There are three points in this case. First. The appellant, as purchaser under a sale for raising legacies, acquired a prior and superior title to the respondent, independently of any question of notice. Second. At all events no relief ought to have been given to him as against the appellant, who was a purchaser for value without notice. Third. The respondent is to be postponed to the appellant because he has by himself or his agent, in this particular transaction, been guilty of fraud, or at least of culpable negligence in not obtaining possession of the title deeds.

The sale here was made under the authority of a power which

¹ 19 Beav. 500.

gave to the appellant, the purchaser, as good a legal estate as the respondent had by his mortgage; if so, the purchaser is entitled to have the whole 6000*l.* credited to him, and if not the whole, then he is entitled to have an apportionment, and to have credit for that portion of the 6000*l.* which would fall as a charge on these farms. The charge in favour of the legatees gave them a legal title, and that has passed into the hands of the purchaser, who, by a purchase made to satisfy the charge, acquires a title paramount to that of the respondent, independently of

* 918 any question of notice. Where such a charge exists the *executors have an implied power of sale: *Shaw v. Borrer*,¹ *Ball v. Harris*,² *Gosling v. Carter*,³ *Robinson v. Lowater*,⁴ *Wrigley v. Sykes*,⁵ *Bugden v. Bignold*.⁶ There is no proof here that any part of the three legacies was paid out of any of the other estates, and there is no doubt that they were paid with the money of the appellant. The respondent had notice of this sale, for it was duly advertised, and he lives in the neighbourhood; he permitted it to take place without opposition; he might have objected to the sale of the particular property over which his security extended, but having failed to do so he has no right now to come and ask for relief from equity by foreclosure against a *bond fide* purchaser without notice.

This decree is wrong in treating the respondent as a legal mortgagee who has not done or omitted any thing which might affect his right of priority. The respondent has been guilty of negligence such as ought to postpone him to a purchaser for valuable consideration without notice, for by leaving the title deeds in the hands of the solicitor to Sir J. K. Shaw he has enabled the latter to deal with the property as if it was without encumbrance, and to obtain the appellant's money. The simple fact of so leaving the deeds was originally sufficient in itself to postpone the mortgagee to a subsequent purchaser, *Goodtitle v. Morgan*,⁷ though that rule has since been modified, but only to a certain extent: *Barnett v. Weston*,⁸ *Farrow v. Rees*,⁹ and *Worthington v. Morgan*.¹⁰

¹ 1 Keen, 559.

^{*} 1 Collyer, 644.

² 8 Sim. 485.

³ 17 Beav. 592, S. C. on Appeal, 5 De G., M. & G. 272.

⁴ 25 Law J. N. S. Ch. 459, 21 Beav. 337.

⁵ 12 Ves. 130.

⁶ 2 Younge & C. Ch. 377.

⁷ 4 Beav. 18.

⁸ Per Buller, J. 1 T. R. 762.

¹⁰ 16 Sim. 547.

* The expression in Fonblanque on Equity,¹ that “noth- * 914
ing but a voluntary, distinct, and unjustifiable concurrence
on the part of the first mortgagee in the mortgagor’s retaining the
title deeds shall be a reason for postponing his priority,” though
spoken of by Lord Eldon² with approval, cannot be adopted to its
full extent. The rule is more properly laid down by Vice-Chan-
cellor Turner in *Hewitt v. Loosemore*.³ A legal mortgagee is not
to be postponed to a prior equitable one, upon the ground of his
not having got in the title deeds, unless there be fraud or gross and
wilful negligence on his part, and the Court will not impute any
of these to the legal mortgagee if he has *bond fide* inquired for the
deeds, and a reasonable excuse has been given for not delivering
them to him; but the Court will impute fraud or gross or wilful
negligence to the mortgagee if he omits all inquiry as to the deeds.
No inquiry whatever was made in this case.

If any had been made the respondent would have been informed
of all the circumstances, but even without inquiry he is bound,
for by employing the same solicitor as the mortgagor he is affected
with notice of all that the solicitor he employs is acquainted with :
Kennedy v. Green,⁴ *Dryden v. Frost*.⁵ The respondent, who might
have seen by the abstract what the title was, ought to have re-
quired other deeds besides those which he actually received, and
not having done so he cannot apply to equity, but must be left to
his legal title and his legal remedy.

[THE LORD CHANCELLOR. — Strictly speaking, neither party
here had the legal title.]

* No, not in possession. It was subject to the term for * 915
one hundred years; but that will not affect the application
here of the general principle as to negligence.

The Courts will always favour a purchaser for valuable con-
sideration. In *Jerrard v. Saunders*,⁶ it was held that a defendant
stating by his answer a purchase for valuable consideration, with-
out notice, shall not be compelled to answer further, and in *Penny*
*v. Watts*⁷ such a purchaser was held to be protected, though the
legal estate was outstanding in a mortgagee. *Bowen v. Evans*,⁸ and

¹ Vol. 1, p. 165, n. 4 ed. and 5 ed. p. 167.

² *Evans v. Bicknell*, 6 Ves. 190.

³ 9 Hare, 449.

⁴ 3 Mylne & K. 699.

⁵ 3 Mylne & C. 670.

⁶ 2 Ves. Jun. 454.

⁷ 2 De G. & S. 501.

⁸ 1 Jones & L. 178, 2 H. L. Cas. 257.

Joyce v. De Moleyns,¹ are to the same effect, and the Master of the Rolls himself, in the *Attorney-General v. Wilkins*,² acted on the same principle.

[THE LORD CHANCELLOR. — It is rather an inaccurate expression to speak of foreclosure as relief: it is calling on the party to exercise his right now or never. The question is, whether the rule of not interfering against a purchaser for valuable consideration applies to foreclosure.]

Foreclosure is relief to the party seeking it, and here by the principle of equity he is not entitled to it.³

It will be contended for the other side that the appellant is affected with notice, because J. Hayward acted as his solicitor, but that is denied. Besides, what he did for the appellant was done in 1845, and the mortgage was in 1842, and the rule does not apply to a matter where the party has entirely changed his solicitor more than two years before, and even though the appellant * 916 might be affected * with notice, so far as his mortgage is concerned, he cannot be affected with it in respect of the sale.

The respondent has been guilty of gross negligence, and his title ought therefore to be postponed. On the other hand, the appellant, when he came to deal with the property, saw Sir J. K. Shaw in possession, and found him to hold the deeds which warranted that possession. In the contest between these two parties the principles of a Court of equity require that he who has done all that prudence demands, should be protected. The appellant alone is in that situation.

Mr. R. Palmer and *Mr. Osborne* for the respondent. — The respondent has the actual legal title, and would be in possession but for the outstanding term. This legal title, too, is prior, in point of time, to that set up by the appellant. There is no pretence to charge negligence, much less fraud, in this case. The deed of 1750 could not be demanded; it related to a much larger estate; the respondent had no means of knowing its existence, and cannot be affected by the fact of not having obtained possession of it. It is of course unwise for the lender of money to

¹ 2 Jones & L. 374.

² Seton's Decrees, 217.

³ 17 Beav. 285.

employ the borrower's solicitor, but that fact alone does not affect the lender with all the knowledge which the other party possesses, *Hewitt v. Loosemore*.¹ He who employs an agent may perhaps be taken to know all that the agent knows, but the agent himself may not know all that each principal knows, and consequently cannot affect one employer by the knowledge which is possessed by the other. The respondent, a retired tradesman, acted like a prudent though not like an experienced man, and is neither chargeable with fraud nor negligence. He saw a will which appeared to dispose of all the property, * and he saw Sir J. K. Shaw * 917 in absolute possession of the whole. The rule on this subject is properly expressed by Mr. Fonblanque,² and was approved of by Lord Eldon in *Evans v. Bicknell*,³ and is not in the least degree impugned by Vice-Chancellor Turner in *Hewitt v. Loosemore*.⁴

There may be many circumstances in which, leaving the title deeds in the hands of the mortgagor will be neither fraud nor gross negligence; and *Hewitt v. Loosemore* proceeds on the principle that one or the other is necessary to be proved before the title of the first mortgagee can be affected. *Harper v. Faulder*⁵ was a strong case of that kind. There, trustees appointed to raise 35,000*l.* granted an annuity secured by a term of years for 5000*l.*, part of the whole; and retaining the title deeds, they afterwards made a mortgage without informing the mortgagee of the annuity. The Court held that the annuitant was not postponed. *Martinez v. Cooper*,⁶ and *Stevens v. Stevens*,⁷ both proceed on the same principle.

Here, too, the person who objects to the prior title of the mortgagee is himself a person affected with constructive notice of this very mortgage, by having employed J. Hayward as his solicitor in the loan, long before he bought the property: *Majoribanks v. Hoven-den*,⁸ recognizing *Sheldon v. Cox*.⁹ As to that matter, it has been said that a knowledge acquired by a solicitor in 1842 cannot affect his client in 1845; but for that argument neither principle of law nor authority by decision can be cited. Besides which,

¹ 9 Hare, 449.

² Treatise on Equity, 4 ed. Vol. 1, p. 165.

³ 6 Ves. 190.

⁴ 9 Hare, 449.

⁵ 4 Madd. 129.

⁶ 2 Russ. 198.

⁷ 2 Collyer, 20.

⁸ Drury, Cas. Temp. Sugden, 11.

⁹ 2 Eden, 224.

* 918 the evidence in this case shows that during * the whole time the interest on the respondent's mortgage was paid by J. Hayward, whom the appellant employed as his solicitor. *Allen v. Knight*¹ is almost identical with the present case. There four trustees sold out stock to lend to two of their number. The two were entitled to a copyhold estate in undivided moieties, and the money was lent on an equitable mortgage of that estate, effected by deposit of the title deeds. By unexplained circumstances, one of the two borrowers afterwards became possessed of these deeds and effected another equitable mortgage, by depositing them with a third person, who had no notice of the first encumbrance. The mortgagor became bankrupt, and the second mortgagee obtained admission by purchasing a surrender from the assignees, having at that time received constructive notice of the first mortgage. In a suit by the lending trustees for foreclosure it was held that the second equitable mortgagee, who had taken the legal estate, with notice of the obligations of the mortgagor to third parties, could only hold that estate subject to such obligations, notwithstanding that he had taken his original mortgage without notice. And that case further decided that without a specific case of fraud the mere possession of the title deeds by the mortgagor was not sufficient to postpone the claim of the first mortgagee. It has been assumed that if the mortgagee knew that there were other deeds than those he possessed, his neglect to demand them must be attributed to fraud, and his claim must be postponed to that of the second mortgagee. But *Plumb v. Fluit*² is an answer to that argument; and that case is the stronger for this reason, that there the money was not lent at the time, but what occurred was done for the purpose of securing a pre-existing debt.

The argument that the appellant must prevail, because he is a purchaser under a sale to satisfy the legacies, which * 919 * were a legal charge on the estate, and that he has therefore obtained a paramount title, cannot be maintained; for that would involve the consequence of throwing on the purchaser or mortgagee, who, as the Master of the Rolls said, is "a purchaser *pro tanto*," the necessity of inquiring whether the mortgage or sale was effected for the purpose of satisfying the charge, or whether the money so obtained was employed in satisfying it. The law does not impose such a necessity on these parties.

¹ 5 Hare, 272.

² 2 Anst. 432.

In this case the vendor, in 1849, could give no better title than he himself possessed, nor could he defeat the mortgage by selling the two farms on which it was secured, and by that sale give a legal title to the purchaser, while he converted that of the original mortgagee into an equitable title.

Mr. Rolt, in reply. — The loan on the mortgage was made subject to the charge of the legacies, and was therefore subordinate to them. The purchaser stands in the situation of the legatees. The mortgage was made by Sir J. K. Shaw in his own right as devisee, and the mortgage money was for his own purposes, whereas the sale was made by the executors in discharge of a charge on the estate. The deeds were held back by J. Hayward, in order to give a benefit to Sir J. K. Shaw, and the respondent is affected by that act, because Hayward was his agent. That makes out a case of gross negligence within the rule established by the cases which have been cited. On the other hand, there is nothing which establishes even a constructive notice to the appellant of the existence of the respondent's mortgage. It is no answer to the charge of neglecting to demand the deeds, that they also related to other property, for here, before the sale, the particulars were duly advertised, * and this property, over which the re- * 920 spondent claims title as mortgagee, was distinguished from the rest. The case of *Harper v. Faulder* does not apply, for there various trusts existed, and the trustees could not part with the deeds on the execution of only a small portion of the trusts. *Farrow v. Rees* has no application to the present case, and *Martinez v. Cooper* depended entirely on a question of fact as to a communication between the two solicitors. *Stevens v. Stevens* merely establishes that lending deeds for the purpose of a person making extracts, which lending he fraudulently turns to his own advantage, does not constitute gross negligence on the part of the lender.

THE LORD CHANCELLOR. — My Lords, my intention is not to ask your Lordships finally to dispose of this case until I have had the opportunity of looking into the authorities upon the point as to holding the deeds, more attentively than I have been able to do during the progress of the argument. With regard to the other points, I entertain very little doubt. First, as to the bill which

was filed by Mr. Finch, the first mortgagee. The objection set up by Mr. Colyer, by way of defence, is the fact that he is a purchaser for valuable consideration without notice, and that therefore a Court of equity ought not to interfere in favour of the plaintiff against him. Now I think that is an entire fallacy. I quite agree in the doctrine that the principle on which the Court protects a purchaser for valuable consideration without notice, is not confined to the case of a purchaser for valuable consideration who has got the legal estate. I have more than once had occasion to consider that question, and it has always appeared to me that the principle on which the Court protects a purchaser for valuable consideration without notice, is wholly regardless of what

* 921 * estate he has. It may be that he has not the legal estate,

but that will be quite unimportant as to a Court of equity interfering or refusing to interfere. His equity depends on this, — that he stands, equitably, in at least as favourable a position as his opponent, and therefore the Court will not interfere against him. But I think that that doctrine cannot by possibility apply to the case of a bill of foreclosure, and there are reasons for so holding pointed out by the Master of the Rolls in his judgment,¹ reasons which are no doubt perfectly satisfactory, but I should proceed on a much shorter ground. For the purpose of that question, whether the Court would interfere against a purchaser for valuable consideration without notice, a foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor, or the purchaser from the mortgagor for valuable consideration without notice, that that purchaser can at any time file a bill to redeem the mortgage, and that being so, it would be most unjust if there was not a correlative right on the part of the mortgagee to say: “You shall redeem now, or you shall never redeem.” Therefore I think that is a ground which entirely puts an end to all question as to Mr. Finch’s suit, and that he would be entitled, unless so far as it is interfering with the other suit, to the decree which the Master of the Rolls has given him, namely, the ordinary foreclosure decree.

Now the cross bill which is filed by Mr. Colyer, a subsequent purchaser, raises substantially two points: First, he says, “I have priority because I claim under a purchase, which being made by

¹ 19 Beav. 510, 511.

the executors to raise money for the purpose of enabling them, together with the devisees, to perform the trusts imposed by the testator, namely, payments of three legacies of 2000*l.* each, gives me a title which is * precedent to any title derived * 922 only under the person who was the person ultimately beneficially entitled; or if it does not give me a better legal title, at all events it gives me a title so far as the amount of the three legacies of 2000*l.* each, to raise which the sale was made." Now, with regard to the first of these points, I have not the least doubt that that is a fallacy. Where there is a general charge of debts, and no legal estate given, it may be that as against the heir at law, the executors may sometimes, perhaps always, possess impliedly a power to convey the legal estate in order to raise the money to satisfy the charge; but that doctrine certainly does not apply to a case where the estate is devised to others or to another, charged with certain payments of debts or legacies; there that money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person and the only person that can make a legal title.

The legal title was unquestionably in this case conveyed by the devisee to Mr. Finch on his mortgage, which was the first title. But then the question is, although Mr. Finch may have taken the legal title, as he certainly did as mortgagee, whether, nevertheless, Mr. Colyer, a subsequent purchaser, when the subsequent sale was made by the devisee at the instance of the executor, avowedly and truthfully to raise amongst other sums 6000*l.* to pay off those three legacies, whether Mr. Colyer, who paid that purchase money for the estate, is not entitled to the extent of that 6000*l.* to stand in the place of the legatees. Now I adopt the reasoning there of the Master of the Rolls (as at present advised, I will not finally commit myself to that, but my impression is very strong with the Master of the Rolls), that all that remained in the devisee Shaw was the equity, because he had conveyed away the legal estate, the equity which he might make available for the purpose * of raising the 6000*l.*; and, subject to that 6000*l.*, the * 923 whole of the property was liable in the first instance to pay the mortgage which had been made to Mr. Finch. In any view of the case, as it was not disputed that the purchase money altogether was more than sufficient to pay all these sums, no question can be of any importance, except the question, whether this claim is right

or not? Because if there is a claim to stand in the place of the legatees for 6000*l.*, still that would only be to stand in their place upon the equity, which was necessarily in the first instance bound to make good the mortgage to Mr. Finch.

I must confess, beyond that, I am very much inclined to accede to Mr. Palmer's argument yesterday. It does not matter that the mortgage to Mr. Finch was not made avowedly for the purpose of raising money to pay debts; that is not at all necessary, nor could he be affected, unless it was apparent on the face of the proceeding that it was not, and could not have been, so intended. I very much incline to think, that where a party, the devisee of real estate charged with payment of debts, sells, the purchaser has no need to inquire at all whether the money is applied in payment of debts, or even whether it is a sale for the purpose of enabling debts to be paid. The old case of *Elliot v. Merriman*,¹ which is always referred to, before Lord Hardwicke, makes no such distinction as to whether it was expressed to be made for payment of debts or not. If there is a charge on the devisee in fee, if he takes the estate charged with the payment of debts alone, or debts and legacies, and if he sells, the great convenience of mankind requires that it should be just as if an executor sells when property comes to him, unless it can be shown that the purchaser knew that the purchase money was not going to be so employed,

* 924 and he was ancillary to something *like a fraud, because he may presume that the sale has taken place in the ordinary administration of the duties which were imposed upon the executor by the will. On both of these points, however, I wish to look into the matter before I finally dispose of this case, which I hope I may be able to do in the course of a day or two.

Then comes the other more important point, on which I think there is much more semblance of cogent argument on the part of Mr. Colyer than there is on the other points to which I have adverted. I allude to the circumstance of Mr. Finch having left the title deeds in the hands of Sir John Shaw at the time he took his mortgage. Now, there is no doubt, I take it, of the principle which is to govern these cases. It is not sufficient, as it used to be thought, to postpone a mortgagee, that he has not taken possession of the title deeds; it must be shown that he left them in the hands of the mortgagor, either fraudulently, or what is called, for

¹ 2 Atk. 43, Barnard. Ch. 78.

want of a better expression, with gross negligence. Cases are very difficult to deal with when you are obliged to use vituperative epithets of that sort in order to enunciate a principle. What constitutes "gross negligence" is always excessively difficult either to define, or, by way of anticipation, to illustrate; but it appears to me at present, that none of the cases, so far as I am aware of them, would entirely justify what was done by the mortgagee here. The leaving of the title deeds by him *prima facie* appears to me to have been an act of gross negligence, and for this reason: the mortgage was made by Sir John Shaw in the year 1842; his solicitor was Mr. Hayward, and there is no dispute that Mr. Hayward acted also for Mr. Finch; that is the common case of both parties; it is so stated both in the bill of Mr. Finch and in his answer. Now, when Mr. Hayward prepared the mortgage deed, and acted both for the mortgagor and for the * mortgagee, it is quite certain that he knew, he must be * 925 taken to have known, and, in fact, he did know, what the title was; that there were title deeds and wills, in one of which one moiety of the property was given one way and one another; one moiety was given to the devisor, under whom Sir John Shaw claimed, and the other moiety was given by will in 1789. Now there is no doubt that the uncle of the present mortgagor, Sir John Shaw, may fairly be taken to have been in possession from 1789, or thereabouts, up to the time of his death in 1839, and then his devisee came into possession, and if there had been an independent solicitor employed, and that independent solicitor had said, "Well, I see here there is a clear proof of seisin for fifty-three years, and I do not think it necessary to inquire any thing more about the deeds; I take the title," I am not clear that there would have been any negligence in not making any further inquiry, or that there would have been any thing that would come within what the Courts would call "gross negligence." I think that there was clear evidence upon the abstracts delivered that that had been the fact, for this reason: the testator, under whom Sir John Shaw claimed by the will of 1839, clearly was in possession in 1799; he redeemed the land tax; therefore he was in possession at that time; and forty years afterwards he makes his will, and under that will it is that the mortgage was made in 1842. That person who was so in possession in 1799 was the general devisee of Mr. Shaw Brooke, who made his will in 1789. Although there is no actual descrip-

tion of the property in the will, yet, inasmuch as we have the will, and we see the party in possession ten years after the will, and as, being the general devisee under the will, he was to take the name,

the inference would be almost irresistible that the title he had * 926 to possession in 1799 was the title derived under * the will.

It is, however, singular enough, that although that would appear to be accurate, it was not accurate, though in fact it amounted to the same thing, because he was entitled to one moiety under the will, and the other moiety under a deed appointing the executors only ; so that, although relying on the fact of seisin, a party would have been under a mistake in supposing it was all to be attributed to the will ; that, however, is not important. In truth, the title to the whole property was a title derived under the testator, though one moiety was derived under the will, and the other under a deed executed concurrently with it. Certainly, if a person in the situation of the plaintiff, Mr. Finch, had taken a mortgage, and employed a regular solicitor, and that solicitor had had handed to him a copy of the will, and proof of seisin for fifty-three years, up to the time of the mortgage, and had made no further inquiry, although there were really other deeds in the hands of the mortgagee, I should have been very reluctant to hold that there was gross negligence. But then I must treat it in this way, as if the solicitor of the mortgagor had said to Mr. Finch, or to the solicitor of Mr. Finch, supposing him to have been a different person, " This, though the apparent title, is not all the title, for I have prior deeds " ; and the solicitor had said, " Never mind, I do not want to look at your prior deeds, I am satisfied with the title as it is " ; would that have been gross negligence within the meaning of the cases on this subject ? Because if it would, I certainly feel great difficulty in saying that it could make any difference that the same solicitor was acting for both parties, and there was therefore no independent advice on the part of Mr. Finch. It is his great misfortune to have employed a man who has not done his duty towards him ; but if John Hayward was acting for both * 927 parties, and John Hayward perfectly well * knew that there were prior deeds, it is a difficult proposition for Mr. Finch to maintain, " because I employed a person who knew that, but only knew it in his character of solicitor for the mortgagor, therefore I am to be absolved from making inquiry on the subject."

Upon these points I should wish to look into the authorities ;

and I hope in the course of the next week to be able to make up my mind on the subject, to see what advice it is fit I should tender to your Lordships. The Master of the Rolls thought that there had not been gross negligence, and possibly I may arrive at the same conclusion ; but I confess I do not think that that is so clear as the other points in the case. If there was not gross negligence I do not think there is any thing in the point about subsequent fraud. With that I think Mr. Finch has nothing to do ; all that was done was unknown to him. The negligence to be imputed to Mr. Finch, if there has been negligence, is a negligence which must have been imputed to his solicitor, if he had acted by an independent solicitor, instead of through the solicitor for the mortgagor.

On these grounds, I now move that the further consideration of this case be postponed.

July 24.

THE LORD CHANCELLOR. — In this case, which was argued a few days since, there were three points made on the part of the appellant, Mr. Colyer. The first was, that he, being the purchaser for a valuable consideration, without notice, the Court ought not to give any relief, even by way of foreclosure, against him. That point was disposed of at the close of the argument.

Another point was, that he was entitled to stand, in priority, in the place of the three legatees for 2000*l.* each. That was also disposed of. I concurred in opinion with * the Master * 928 of the Rolls, that there was no foundation for that plea.

The only question which remained to be disposed of was that arising from the fact of Mr. Finch, the mortgagee, having left the title deeds in the hands of Sir John Kenward Shaw, the mortgagor, by means of which the latter was enabled afterwards to make an apparently good title to the appellant. The question was, whether Mr. Finch, the mortgagee, by so doing had put himself into such a situation as to be disqualified from setting up his prior legal title.

The rule on this subject is now well settled. A first mortgagee having the legal title is not to be postponed to a subsequent purchaser or mortgagee, merely because he has not possessed himself of the title deeds. In order to deprive the first mortgagee of his legal priority, the party claiming by title subsequent must satisfy

the Court that the first mortgagee has been guilty either of fraud or gross negligence, but for which he would have had the deeds in his possession. What are the circumstances which will amount to or be evidence of gross negligence, it is difficult to define beforehand; but I think that *prima facie* a mortgagee who, knowing that his mortgagor has title deeds, omits to call for them, or who omits to make any inquiry on the subject, must be considered to be guilty of such negligence as to make him responsible for the frauds which he has thus enabled his mortgagor to commit. But is that the case here? The respondent positively denies any knowledge on the matter, and says that he gave J. Hayward instructions to prepare a proper mortgage, and he did prepare that indenture accordingly. [His Lordship here read the extract from the respondent's affidavit.] The result of all this is, that Finch obtained a valid legal mortgage, together with certain documents, which Hayward represented to him as being, and which Finch * 929 believed to * be, the muniments of title, which made him completely secure. All the material documents were not furnished.

Now, but for the circumstance that Finch employed Hayward as his solicitor, there would be no pretence for saying that there was in this transaction any thing like culpable negligence on the part of Finch. He did all that a person in his situation could do; he obtained a valid conveyance, together with documents, which the solicitor of the mortgagee, a man of credit and respectability, told him made his security perfect. To hold that he was guilty of gross negligence in not making further inquiry and investigation, would be to hold that to accept a mortgage security without taking all the precautions which an experienced conveyancer would suggest, may subject the person accepting it to the consequences of fraudulent misconduct, or of gross negligence, so gross as to be tantamount to fraud, a conclusion at variance with all the authorities.

I may refer particularly to the case of *Evans v. Bicknell*,¹ which was a case where the deeds had got into the hands of the mortgagor, having been lent by the trustees of the marriage settlement under circumstances which the Court held did not involve fraud, though it might be an imprudent act. In *Barnett v. Weston*,² a case before Sir William Grant, there was a loan of the deeds in the

¹ 6 Ves. 174.² 12 Ves. 130.

same way. *Farrow v. Rees*¹ was a case where the deeds related to settlement property, and several other cases were referred to, such as *Worthington v. Morgan*,² *Allen v. Knight*,³ and *Hewitt v. Loosemore*.⁴

If, then, such would have been the result, supposing Finch not to have employed Hayward in the business, does the circumstance of that employment make any difference? * I think * 930 not. The only employment was an employment to prepare the deed, which was a mere ordinary mortgage in fee from Sir John Kenward Shaw, reciting his uncle's will, under which he was tenant in fee simple of the property mortgaged. There was no investigation of title, Finch relying on Hayward's assurance that Sir John Kenward Shaw was, as in fact he was, seised in fee simple in possession, free from encumbrances. If this assurance had been false, if there had existed prior charges on the property, then would have arisen the question how far Finch, by employing Hayward to prepare his deeds, was affected with notice of these charges; but no such question did or could arise, for no prior charges, in fact, existed; and with regard to the handing over of the documents, Hayward was in no respect the agent or solicitor of Finch. Finch, in that part of the transaction, acted for himself, Hayward acted for Sir John Kenward Shaw; and when Finch accepted from Hayward the copies of the wills and other documents as being what was necessary to make him secure, the only question is whether he was bound, in order to relieve himself from the imputation of fraud or gross negligence, to inquire further of the mortgagee, or of Hayward, as his solicitor. I have already said that I think he was not; consequently, the appellant fails in this part of the case, as well as in those which were disposed of last week. And I shall therefore move your Lordships to dismiss the appeal, with costs.

*Decree affirmed, with costs.*⁵

Lords' Journals, 24th July, 1856.

¹ 4 Beav. 18.

⁵ 5 Hare, 272.

² 16 Sim. 547.

⁴ 9 Hare, 449.

³ See *Rancliffe v. Parkyns*, 6 Dow, 149.

*931

* M'MAHON v. LEONARD.

1856. July 1.

M'MAHON, *Plaintiff in error.*SIR T. B. LEONARD and others, *Defendants in error.*¹

*Error. Final Judgment. Form of Judgment. Venire de novo.
Costs.*

The Court in which an action was brought gave a final judgment; a Court of error reversed or varied that judgment, though the form in which this was done in the Court of error was not that of a final judgment:—

Held that error would lie to this House.

A judgment of the Court of Common Pleas in Ireland had overruled a bill of exceptions. On error to the Exchequer Chamber there, the judgment of that Court was, that some of the exceptions be allowed and some disallowed, and that the judgment be reversed, annulled, and held for nought: A *venire de novo* was awarded. On error brought to this House, after the 16 & 17 Vict. c. 113, § 169 (Ir.):—

Held, that the defendants in error might join in error in the usual form, without thereby admitting that any of the exceptions had been properly overruled, the judgment of the Court of Exchequer being treated as restricted to reversing, &c., that of the Common Pleas, and awarding a *venire de novo*.

The costs were reserved till the hearing.

THIS was an action on the case brought in the Court of Common Pleas in Ireland by M'Mahon for disturbance in the office of weighmaster of the town of Clones, in the county of Monaghan. The cause was tried before Lord Chief Justice Monaghan at the sittings in that Court after Trinity term, 1852, when a verdict, with damages, was found for the plaintiff. A bill of exceptions (raising fourteen exceptions) was tendered to the ruling of the learned Judge, and on argument in the Court of Common Pleas² was overruled, and judgment given for the plaintiff.³ A proceeding in error was brought on that judgment, and the Court of Exchequer allowed the ninth and twelfth exceptions, and overruled the rest. The entry was in the following form.

¹ See *M'Mahon v. Lennard*, 6 H. L. Cas. 970.

² By the 28 Geo. 3, c. 31, § 1 (Ir.), a bill of exceptions is first considered in the Court in which the action is brought. See *Bank of Ireland v. Trustees of Evans's Charities*, ante, 389.

³ 4 Irish Law N. S. 16.

* (5 Irish Law, 277): "It appears to the said Court of * 932 Exchequer here that the said ninth exception and twelfth exception ought respectively to be allowed, and that the other exceptions, and each of them respectively, ought to be overruled; and that in the record and proceedings aforesaid, and in giving the judgment aforesaid for the said John M'Mahon, there is manifest error, so far as relates to the said ninth and twelfth exceptions; therefore it is considered by the said Court of Exchequer Chamber that judgment aforesaid, for the error aforesaid, be reversed, annulled, and altogether holden for nought, and that the verdict so as aforesaid found for the said John M'Mahon, be quashed and held for nought. *Venire de novo* to be awarded."

On error, to this House, a petition to quash the proceeding in error, or to file a special joinder, was presented by the defendants in error.

Sir F. Kelly (with whom were *Mr. Hercules Ellis*, of the Irish bar, and *Mr. Karlake*) in support of the petition. — The proceeding here is erroneous in substance and in form. Error will not lie upon an award of a *venire de novo*, for that is not a final judgment, and no writ of error lies except upon a final judgment: *Samuel v. Judin*.¹ The matter is settled in this country by the provisions of the Common Law Procedure Act of 1854, 17 & 18 Vict. c. 125, § 43. But the same provision does not apply to Ireland, where proceedings are regulated by the old rules. The terms of that Act are not declaratory, but enacting. The law was originally the same in both countries, and consequently the form of the enactment shows what was the law in England before the passing of that Act, and * what therefore it still is * 933 in that country. The question arose on a previous occasion in Ireland, and was decided in the same manner: *Kennedy v. Gregg*.²

The cases in this country are *Beckham v. Knight*,³ *Hinton v. Acraman*,⁴ *Metcalfe's Case*,⁵ *Finch v. Renew*,⁶ all of which show that a writ of error will not lie till a final judgment has been given.

¹ 6 East, 333.

⁴ 4 Dowl. & L. 462.

² 10 Irish Law, 558.

⁵ 11 Rep. 38 b.

³ 7 Dowl. P. C. 409.

⁶ 3 Salk. 145. See also *Fitzwilliams v. Copley*, Dyer, 291 b, pl. 68 n.

[THE LORD CHANCELLOR. — There is often in a Court of error here an argument whether there ought not to be a *venire de novo*. How could such an argument there arise if your contention is right?]

Because all the exceptions have been allowed or disallowed. That would be a final judgment.

But suppose error to lie on the award of a *venire de novo* in a case like this, then the form of the judgment must be amended, otherwise the defendants cannot safely join in error. As the record now stands they cannot say that there is no error, and pray that the judgment may be in all things affirmed, for twelve out of their fourteen exceptions have been, as they say, improperly disallowed. The form of the judgment is wrong in introducing the statement as to which of the exceptions were allowed, and which disallowed, and then giving judgment of the *venire*; the Court might as well have introduced on the record the reasons for that judgment. If therefore the House should hold that a proceeding in error will lie in this case, the form of the judgment must be amended before the defendants are called on to file a joinder in error.

Mr. Napier, for the plaintiff in error, was stopped.

* 934 * THE LORD CHANCELLOR. — This question comes before your Lordships upon a petition from the defendants in error. The plaintiff recovered a final judgment in the Court of Common Pleas in Ireland for 200*l.* damages, notwithstanding certain exceptions that were taken to the ruling of the learned Judge at the trial. There was therefore a final judgment in his favour in that Court. Against this final judgment a proceeding in error was brought to the Court of Exchequer Chamber, and that Court did not concur with the Court of Common Pleas, but awarded a *venire de novo*. From that decision of the Court of Exchequer Chamber the plaintiff below has come to your Lordships' House, alleging error, and the first question raised is whether error will lie from a judgment awarding a *venire de novo*. In this case a *venire de novo* was awarded by the Court of Exchequer Chamber, as a substitution (so to say) for the final judgment which the plaintiff had obtained in the Court of Common Pleas; and it certainly must be competent for the plaintiff below to insist that that final judgment

was right, and ought not to have been disturbed. It therefore appears to me extremely doubtful whether that question as to error lying against a judgment awarding a *venire de novo* can arise; but upon that point, before we hear any thing from the learned counsel for the other side, I should wish to hear what are the opinions of the learned Judges. If they should be of opinion that error upon a judgment awarding a *venire de novo* does not lie, then, of course, we must hear the learned counsel on the other side. But if they should be of opinion that in such a case error will lie, then arises the ulterior question, whether, in the present form, the judgment has been so drawn up as that your Lordships can proceed upon it, or, if not, what ought to be done upon it. In the first place, I should wish to ask the *learned *935 Judges whether error upon the judgment awarding the *venire de novo* in this case lies or not.

MR. BARON ALDERSON. — My Lords, I am authorised on the part of the learned Judges to say that they are of opinion that error will lie from the judgment awarding the *venire de novo* in this case. The authorities cited apply to those cases where there is no final judgment in the Court below at all. In this case there was a final judgment in the Court below; that is to say, in the Court of Common Pleas in Ireland, which judgment was sought to be set aside by error brought in the Court of Exchequer Chamber in Ireland. The learned Judges authorise me to say, that, there being a final judgment of the Court of Common Pleas in Ireland, which has been brought into doubt by the judgment of the Court of Exchequer Chamber, in their opinion it is competent for a proceeding in error to be brought, for the purpose of setting aside this latter judgment, and restoring the final judgment of the Court of Common Pleas in Ireland.

THE LORD CHANCELLOR. — My Lords, I entirely concur in that view of the case. Here there was in the Court of Common Pleas in Ireland a final judgment for the plaintiff below; that final judgment has been reversed, so to say, or varied, by the decision of the Court of Exchequer Chamber awarding a *venire de novo*. Against that which was a judgment defeating the final judgment of the Court below, it seems to me that, upon all principle, it is quite clear that a proceeding in error will lie to your Lordships' House.

But now remains the important question, whether this judgment, as it now stands, is in proper form, or whether your
 * 936 Lordships ought to take any and what steps to enable * the defendants in error to come here unclogged by any thing which shall fetter them in supporting their view of the case that there ought to be a *venire de novo*. The view, Mr. Napier, which the House takes is this, that the defendants in error, in defending here the decision of the Court of Exchequer Chamber, ought simply to have to argue, unclogged by any thing which shall restrict them to the allowance of one or another exception, that a *venire de novo* was properly awarded. If the Court of Exchequer Chamber thought that there ought to be a *venire de novo*, then the judgment ought to have been simply a judgment awarding a *venire de novo*, saying nothing about one exception being good and another exception being bad.

Mr. Napier. — The Judges in the Court of Exchequer Chamber thought that they were bound to decide on all the fourteen exceptions: *Cooke v. Elphin*.¹ This proceeding in error depends on the terms of the Irish Statute (16 & 17 Vict. c. 113), which are (§ 170) that “either party alleging error in law may deliver to the Master of the Court a memorandum in writing, in the Form No. 12, contained in the schedule.” Now, the Form No. 12 is simply that “there is error in law in the record and proceedings in this action.” The proper course will be, not to quash the proceeding in error, but to take the argument, or so much of the judgment of the Exchequer Chamber as allows some of the exceptions, and therefore reverses the judgment of the Common Pleas. The judgment of the Court of Exchequer Chamber begins with the *ideo consideratum est*. The *venire de novo* is a mere consequence of this judgment.

Sir F. Kelly. — The defendants only desire to argue the award of the *venire de novo*; but they object to go to a new trial
 * 937 with a form of judgment that will make it appear * that this House is of opinion that some of their exceptions have been properly overruled.

LORD CHANCELLOR. — The case must go on in its usual course; it will be open to the defendants in error to sustain the judgment upon any of the fourteen exceptions, or upon any thing arising upon the face of the record.

¹ 2 Dow & C. 247.

Sir Fitzroy Kelly. — Then we may join in error in the usual form, without admitting that any of our exceptions have been properly overruled.

LORD CHANCELLOR. — Yes. The question of costs will be reserved by the House till the hearing of the argument on the alleged error.

Prayer of the petition refused, and costs reserved.

[After this case had been decided, the 19 & 20 Vict. c. 102, "The Common Law Procedure Amendment Act (Ireland)," was passed, the forty-ninth section of which is almost a copy of the forty-third section of the English Statute 17 & 18 Vict. c. 125.]

EARL OF MOUNTCASHELL v. VISCOUNT O'NEILL.

1856. July 1, 18, 24.

The EARL OF MOUNTCASHELL, *Plaintiff in error.*

VISCOUNT O'NEILL, *Defendant in error.*

Trees. Tenant for Life. Agent. Registry. Affidavit.

The 23 & 24 Geo. 3, c. 39 (Ir.), gives, by § 1, to "any tenant for life or lives, by settlement, dower, or courtesy, jointure, lease, or office civil, military, or ecclesiastical, impeachable of waste, or any tenant for years exceeding fourteen years unexpired, who shall plant, or cause to be planted, any timber trees," &c., the right to cut the same during the term. The second section provides, "that any tenant so planting," &c. shall within twelve months lodge with the clerk of the peace of the county an affidavit, "reciting the number and kinds of the trees planted, and the name of the lands, in form * follow- * 938 ing." The form given is, "I, A. B., do swear that I have planted, or caused to be planted, on the lands of , held by me from ,," and "that I have given notice to the person under whom I immediately derive, or his agent, of my intention to register." A. held lands from B. under leases for lives, on different demises granted by B.'s ancestor to A.'s ancestor: A. planted trees, and made the affidavit, but mentioned lands held under different demises, and did not distinguish the number of trees planted on each land: —

Held, that the second section of the statute included a tenant for life, and that the affidavit was sufficient: and

Held, that under this statute an affidavit might be made by the agent and manager of A., for and on behalf of A.

A. also occupied lands under C. adjoining to those of B.; A.'s agent made an

affidavit, including both descriptions of lands, and giving the gross number of the trees planted, but not distinguishing the number planted on the land of B. from those planted on the land of C. : —
Held insufficient.

ERROR on a judgment of the Court of Exchequer Chamber in Ireland, which had reversed a judgment of the Court of Queen's Bench there, in an action of trover brought by the plaintiff for trees. The plaintiff, the Earl of Mountcashell, claimed these trees as the reversioner of lands in the parish of Skerry, in the county of Antrim. These lands had been demised by his father to the brother of the present defendant in error for three lives, one of which was still subsisting. The defendant claimed the trees under the 23 & 24 Geo. 3, c. 39 (Ir.), intituled, "An Act to amend the Law for the Encouragement of Planting Timber Trees."¹

¹ By which it is enacted, § 1. That from and after the passing of this Act, any tenant for life or lives, by settlement, dower, courtesy, jointure, lease, or office, civil, military, or ecclesiastical, impeachable of waste, or any tenant for years exceeding fourteen years unexpired, who shall plant or cause to be planted any timber trees, of oak, ash, elm, beech, fir, alder, or any other trees, shall be entitled to cut, fell, and dispose of the same or any part of the same at any time during the term.

§ 2. Provided always, that any tenant so planting or causing to be planted shall, within twelve calendar months after such planting, lodge with the clerk of the peace of the county or county of a city where such plantation shall be made, an affidavit, sworn before some justice of the peace of the said county, reciting the number and kinds of the trees planted, and the name of the lands, in form following: I, A. B., do swear that I have planted or caused to be planted, within twelve calendar months last past, on the lands of _____, in the parish of _____, held by me from _____, the following trees (here reciting the number and kinds of trees), and that I have given notice to the person or persons under whom I immediately derive, or his, her or their agent, of my intention to register said trees twenty days at least previous to this day, and that I have given notice of my intention to register said trees by public advertisement in the "Dublin Gazette" thirty days at least previous to the date hereof (or else — [and that I have also given notice of the same in writing to the head landlord, owner or owners of said ground, or his or their agent, twenty days previous to the date hereof] as the case may be).

§ 6. And for the preventing of fraudulent registries, be it enacted, that any person under whom the lands shall be held, mediately or immediately, whereon the trees registered, or the enclosures registered, in pursuance of this Act, may be, and who shall think himself or herself aggrieved by a fraudulent registry, may apply to the justices of said county assembled in quarter sessions at any time within twelve months after such registry (or, if he or she be a minor at the time of registering, within twelve months after he or she shall arrive at the age of

*There had been eight different plantings on lands held *939 by the defendant, and in taking proceedings under the statute * there had been eight affidavits filed, and notices *940 given, and advertisements inserted in the Gazette. The question in the cause was, whether the affidavits filed were sufficient under the statute. At the trial of the cause before the Lord Chief Justice, at the sittings after Hilary term, 1852, the jury returned a special verdict, declaring the titles as landlord and tenant of the respective parties, and the authority of W. M'Auliffe, as Earl O'Neill's agent; and found that on the 5th June, 1816, Earl O'Neill lodged with the Clerk of the Peace for the county of Antrim an affidavit in the following form: "I, the Right Honourable Charles Henry St. John, Earl O'Neill, do swear that I have caused to be planted, &c. on the lands of Claggan and Aghafattan, in the parish of Skerry, held by me from the Earl of Mountcashell, the following trees, to wit" (specifying their sorts and their numbers), "and that I have given notice to George Joy, Esq., agent to the said Earl of Mountcashell, under whom I immediately derive, of my intention to register said trees twenty days, at the least, previous to this day, and that I have given notice of my intention to register said trees, by public advertisement, in the Dublin Gazette, thirty days at the least previous to the date hereof." In this affidavit no distinction was taken between the trees planted on the lands of Claggan and those planted on the lands of Aghafattan. The two descriptions of land were held under different demises, though from the same landlord. The advertisement in like manner was framed in the name of the Earl himself: "I hereby give notice, that I have caused to be planted, &c. on the lands of Claggan and Aghafattan, in the parish of Skerry, held by me from the Earl of Mountcashell," &c. and it was signed, "O'Neill."

twenty-one years), which justices, on receiving a petition complaining as aforesaid of a fraudulent registry, and also an affidavit that notice of such intended complaint had been served on the tenant twenty-one days at the least before such quarter sessions, shall cause a jury to be impanelled, who shall decide whether the said registry be a true registry or not, and if they shall find it to be a false registry, then the same shall be deemed utterly null and void and of no effect; but if they shall find for the tenant, then the registry shall be deemed good, and their verdict in both cases shall be conclusive.

The 7th and 8th sections allow the tenant to sell to the person "under whom he derives mediately or immediately" his interest in the trees.

The second affidavit was lodged with the Clerk of the Peace on the 18th October, 1820, and was in these terms: "I, William * 941 M'Auliffe, do swear, that I have planted, or * caused to be planted, within twelve calendar months last past, for the Right Honourable Earl O'Neill, on the lands of Claggan, &c. held by the said Earl O'Neill, from the Earl of Mountcashell" (then followed a description of the trees), "and that notice has been given to George Joy, Esq., agent to the said Earl of Mountcashell, under whom the said Earl O'Neill immediately derives, of his Lordship's intention to register the said trees," &c. This affidavit was signed "Wm. M'Auliffe."

The advertisement in the Gazette, relating to these trees, was given in the name of Earl O'Neill himself.

The third affidavit related to trees planted partly on the lands of Killycharn, in the county of Antrim, held by Earl O'Neill, as tenant to Alexander Davison, Esq., and partly on some of the lands of Claggan. This affidavit, made in October, 1821, the notice given and the advertisement in the Gazette were all made by M'Auliffe, the words in all being "I have planted, or caused to be planted, for Earl O'Neill." In this affidavit the gross number of trees planted was stated, but no distinction was made between those planted on the lands of Davison and those planted on the lands of Lord Mountcashell. There were five other affidavits and notices in the same form as the second, all relating to lands held of Lord Mountcashell.

The case was argued in the Court of Queen's Bench on the special verdict, when judgment was given for the plaintiff on the first and third plantings (on the ground that the descriptions and numbers of trees on lands held under different demises were not properly distinguished), and for the defendant as to the remainder.¹ Both parties carried this judgment into the Court of Exchequer Chamber. That Court, on the 24th July, 1852, affirmed, by a majority, the judgment of the Court of * 942. Queen's Bench, * so far as it was in favour of the defendant, but reversed it so far as it was in favour of the plaintiff on the first and third plantings, and gave a general judgment for the defendant.² The case was brought on error to this House. Justices Coleridge, Creswell, Erle, Williams, Crompton, Crowder,

¹ 2 Irish Law, 436.

² 4 Irish Law, 345.

and Barons Alderson, Martin, and Bramwell attended at the argument.

Mr. Deasy and *Mr. Surrage* for the plaintiff in error. — These affidavits are not sufficient. The form given by the statute shows that the Legislature contemplated that in every instance the affidavit should be made by the individual tenant himself, and not by his agent. Every affidavit must also contain such a description of the trees as shall enable the landlord to know clearly what are those claimed by the tenant, and this is especially the case where the tenant holds two denominations of land under one landlord, or where he claims trees planted on lands held under one landlord, but planted at the same time with other trees on lands held under another landlord.

The whole Act shows that the "tenant" was meant to be restricted to the tenant, properly so called. The word is any "tenant," not any "person"; a tenant for life is not included, except under the first section; the occupying tenant is meant in the others, and he alone can make the affidavit; and in making it, he is not to be at liberty to depart from the form prescribed. Such is the rule laid down by Lord Cottenham, in *Galwey v. Baker*.¹ The affidavits made in this case by the defendant as tenant for life, and by M'Auliffe as his agent, are therefore invalid. Again, one of these affidavits claims in respect of a planting on two denominations of land (Claggan and Aghafattan), both held under the plaintiff, but under different tenures; * another, * 943 in respect of a planting on two denominations of land, only one of which was held under the plaintiff, another being held under Mr. Davison, yet the gross numbers of the trees planted are lumped together, so that it is impossible for the plaintiff to distinguish how many of the trees had been planted on his land, and how many on that of Mr. Davison.

The right to the trees is vested by the common law in the landlord. The statutory right being one of an exceptional kind, the person claiming the benefit of it must bring himself clearly and specifically within the exception created in his favor. That has not been done here. The language of the statute imports the identity of the person planting, and of the person making the affi-

¹ 7 Clark & F. 379 - 401.

davit, and putting his claim on the register. The words of the Act are mandatory, and must be strictly followed; the *King v. Jefferies*,¹ where it is said that if any particular form is prescribed in a statute, it must be complied with; and that rule was acted on in *Davison v. Gill*,² which was a question arising on the validity of an order for stopping up a footpath. This strictness is especially necessary here, for there are words in the form of affidavit, such, for instance, as "my intention," which can only be truly used by the tenant himself. The agent can have no "intention" in such a case. Such provisions in a statute are never merely directory. There were no forms in the early Irish Acts on this subject; they have been introduced here, and they must be strictly followed. The statute here allows agency on the part of the landlord, but it does not provide for it on the part of the tenant. Indeed, in the case of minors, idiots, or lunatics, there would be no power to appoint an agent. The words in the sixth section explain the

* 944 reason for requiring the affidavit to be made by the * tenant.

If the claim of the tenant is not successfully impeached, a Parliamentary title to the timber is conveyed to the tenant. The landlord has only twelve months to inquire, and he is for ever afterwards bound. It must, therefore, have been intended by the Legislature that the proceedings which were to be so binding on him should be strictly pursued, and the more so, as the landlord has no power to go before the sessions, except in a case in which he charges a fraudulent registration.

A reference to the other sections of the statute will show that it was not intended to apply to all tenants whatever. Persons absent from the realm, for instance, never could take advantage of it. Again, the seventh and eighth sections give a right to the tenant to sell; but to whom? to "the person under whom he derives mediately or immediately." In no section except the first is there any mention of a tenant for life; wherever, therefore, the word "tenant" afterwards occurs in the statute, it must be restricted to tenants properly so called, and when they act upon it they must be bound to adhere strictly to the forms it has given, otherwise acts may be done without the authority of the principal, and in the present case there is nothing which necessarily connects the principal with the agent, and makes the act of the latter binding on him.

¹ 4 T. R. 769.

² 1 East, 64.

Mr. Napier and *Mr. H. Hill* (*Mr. J. D. Coleridge* was with them) for the defendant in error. — There are two questions here: First, whether the statute does or does not include tenants for life, and require that in all cases the affidavit of registry should be made by the tenant, or whether it may not in some cases be made by another person. Second, whether the affidavit must always describe the particular denominations of the lands, and the exact number of the trees planted on it, and * distinguish each * 945 denomination where the lands are held under the same landlord, or under different landlords.

As to the first question, a reasonable construction must be given to the statute, otherwise the policy of the Legislature will be defeated, *Standish v. Murphy*; ¹ *Pentland v. Somerville*.² This is not a statute passed to take away a common-law right, but rather to give encouragement to individuals to do that which in benefiting themselves will benefit the country. The construction on the other side might prevent any affidavit from being made; for if minors, idiots, and lunatics cannot appoint an agent, neither can they make affidavits. The word "person" does apply to the tenant. Trace these statutes from their commencement, and there can be no doubt of the intention of the Legislature. The 10 Wm. 3, c. 12, attempted to compel the planting of trees; but that attempt utterly failed, and the statute was repealed. Then came the 8 Geo. 1, c. 8, to encourage the planting of trees by giving benefits to those who planted them. That statute refers to tenants for life, for years, and by lease; and the 9 Geo. 2, c. 7, extended its provisions to tenants under settlements. Then came the 5 Geo. 3, c. 17, which, reciting that it was equal to the inheritance whether the tenant did not plant trees, or whether he took away what he had planted, enacted that tenants for lives, renewable forever, should not be impeachable for waste in trees planted by them, and that tenants for life, by settlement, dower, courtesy, jointure, or lease, or by any office, civil, military or ecclesiastical, or any tenant for years, exceeding twelve years unexpired, should be entitled to the benefit of the statute, on lodging a certificate with the clerk of the peace, &c. The 7 Geo. 3, c. 20, was an Act to continue several temporary statutes, * and in the * 946 11th section it recites the previous statutes on this subject, and that doubts had arisen whether the term "tenants for life"

¹ Per Lord Chancellor Brady, 2 Irish Ch. 271.

² 2 Irish Ch. 289.

included tenants in fee farm, and it enacts that they shall be included. The different classes of tenants being thus provided for in the earlier statutes, there was no necessity again to particularize them in the 23 & 24 Geo. 3, and this continued series of provisions showed it to be the settled purpose of the Legislature that all these classes of tenants should receive the benefit of their plantings.

The words here are directory, not mandatory, and the House must construe them as the Courts construed similar words in *The King v. Loxdale*,¹ *The King v. The Justices of Leicester*,² *The King v. The Inhabitants of Birmingham*.³ In Furlong on Landlord and Tenant,⁴ it is said: "The affidavit will be sufficient if it contains in substance all the matters required by the Act, though the form given by the statute may not be strictly pursued." And such has always been the spirit in which the Act has been construed.

The form of the agent's affidavit here is sufficient. Every affidavit says, "I W. M'Auliffe for Earl O'Neill," and the special verdict finds that the person thus giving notice was the agent and manager and steward of the land for Earl O'Neill. But if there had been any defect of form, that might have been corrected at the sessions, in any case in which there was reason to dispute the correctness of the facts stated.

Mr. Deasy, in reply. — The cases cited on the other side do not apply. They merely show that in certain poor-law proceedings the personal presence of a pauper is not required. But * 947 those are * not cases where new rights are given to individuals on the condition of complying with certain forms. Here the forms are of the essence of the thing, as was held in *The King v. Loxdale*,⁵ and must, therefore, be followed. It is so with respect to the tenure of the lands, and also the numbers of the trees. In neither respect are these affidavits sufficient. To state in one affidavit, and in a lumping amount the numbers of trees planted on two denominations of lands, held under different leases of the same landlord, but still more of trees planted on lands held under different landlords, is not to give that informa-

¹ 1 Burr. 445, 447.

⁴ Vol. 1, p. 669.

² 7 B. & C. 6.

⁵ 1 Burr. 445.

³ 8 B. & C. 29.

tion which it was certainly the intention of the Legislature to require.

THE LORD CHANCELLOR proposed the following questions for the Judges : —

“ Where a tenant for lives at a money rent plants trees on the lands demised, and desires to register the same so as to have the benefit of the Irish Act, the 23 & 24 Geo. 3, c. 39, will the requisition of the statute be duly complied with if the affidavit required by the second section is made, not by the tenant himself, but by his agent, cognizant of the facts connected with the planting, and making the affidavit on behalf of the tenant ?

“ Where such a tenant holds two denominations of land under one landlord, but by different demises, is the affidavit sufficient if it states the number and kinds of trees planted on both, without distinguishing how many and what kinds of trees are planted on each denomination ?

“ Where the two denominations of land are held under different landlords, is it then necessary to state in the affidavit the number and kinds of the trees planted on each denomination, or is it sufficient to state the number and kinds planted on the two denominations taken together ? ”

* MR. BARON ALDERSON requested time for the Judges to * 948 consider the questions.

MR. JUSTICE CROWDER. — My Lords, her Majesty's Judges have considered the questions submitted to them by your Lordships in this case, and have deputed me to give their answers.

We answer the first question in the affirmative. It relates to the second, fourth, fifth, sixth, seventh, and eighth registries, and it depends on the question whether an affidavit made by Mr. M'Auliffe, an agent on the part of Lord O'Neill, the tenant, is a sufficient compliance with the provisions contained in the second section of the 23 & 24 of Geo. 3, c. 39. We think it is so.

It appears that there has been a series of Acts directed to the encouragement of planting of timber trees by tenants on the estates held by them ; and for this purpose they give a conditional property in the trees planted to the tenant by whose care and at whose expense they have been planted ; and this valuable privilege is given by the statute above named to any tenant for life or lives

by settlement, dower, courtesy, jointure, lease, or office, civil, military or ecclesiastical, impeachable of waste ; and, secondly, to any tenant for years exceeding fourteen years unexpired. These persons are to have a property in the trees planted by themselves, and may cut or dispose of the same or any part of them during the term.

But of course it could not be supposed that the Legislature would give this privilege to tenants unconditionally. Accordingly, we find several conditions imposed by the subsequent clauses of the Act. The only one of these with which we have to deal is that contained in the second section. That provides that "any tenant so planting or causing to be planted, shall, within * 949 twelve calendar months * after such planting, lodge with the clerk of the peace for the county where the planting is made, an affidavit reciting the number and kinds of the trees planted, and the name of the lands in form following." The statute then proceeds to give a form for that purpose.

The plain object of this was to give full information to the landlord on two points only : first, of the number and kinds of the trees planted ; and, secondly, of the lands whereon they were planted. The doing this would distinguish them from the trees, if any, already standing on these lands ; and so the rights of the landlord in those trees might be preserved. And this being required to be done within a twelvemonth after the planting, and the party registering being required, as the subsequent part of the affidavit shows, to give twenty days' notice of his intention to register to the persons under whom he immediately derives title, and twenty days' notice to all the world, by public advertisement, in the Gazette, it seems to have been thought that this would be sufficient to put all persons interested on their guard, so as to enable them to come to the quarter sessions, and oppose, and perhaps, if necessary, qualify and correct the registration of the planted trees.

But what in all this is there which would require the affidavit to be made by the tenant himself ? Plainly, nothing. What is really wanted to fulfil all these requisites is, that a faithworthy person acquainted with the facts should pledge his oath that they are true. How could it be of any use that this should be the tenant himself ? He would not be likely to know the fact of the planting, the number and kinds of the trees, the service of the notice

on the landlord or his agent, or the insertion of the notice in the Gazette. He might be absent, might be an infant, incapable or ignorant of these several facts; or the facts might require a joint affidavit from several persons to establish them.

* The Legislature could never be supposed to require such * 950 absurd impossibilities, at least not without express words.

The only ground for saying so is, that the form for the affidavit uses the words "I, A. B," at the commencement, and speaks in the name of A. B., of lands held by "me," of trees which "I" have planted, and of persons under whom "I" derived, and of "my" intention to register. No doubt these words would have this meaning, if A. B., the tenant, really made the affidavit; and ought to be modified if the affidavit should be made by any one else. But it is too much to say that the words "in form following," followed by a correct form in case the affidavit is made by the tenant, must mean, that no one but the tenant is to make the affidavit, and that the form, if another person makes it, may not be varied according to reason and common sense.

In the first place the earlier words of the section only speak of "an affidavit" being lodged, not stating by whom made. And this is the more to be observed, because the previous Act of Parliament, 5 Geo. 3, c. 17, had distinctly required a certificate from the tenant himself. The 23 Geo. 3, which had apparently for its main object the giving greater facility to the tenant, has substituted an affidavit for the certificate, but has not required the affidavit to be made, as the certificate was by the tenant; and probably because, though a certificate might reasonably be made on information of others, an affidavit ought only to state facts known to the party himself, who swears to its truth. When the former words do not include it, why should we draw so unreasonable an inference from the subsequent words, "in form following"?

But, secondly, there are two reasons why we should not. First, that those words may well be construed to apply only to the form in which the two facts, the only really * material * 951 ones, are subsequently to be stated in the affidavit. These two facts are the numbers and kinds of the trees planted, and the name of the lands; and the form following may well mean and refer to the way in which these are to be stated, thus,—“the following trees” (here reciting the numbers and kinds of the trees in detail); and the name of the lands,—“the lands of

, in the parish of

.” But if this be not so, it seems more reasonable to conclude that, inasmuch as “any tenant” planting, is to lodge an affidavit, which we think, in reasonable construction, must include tenants for life, as well as tenants for years, and as the form of the affidavit will clearly not do for the former, the Legislature must have put the form generally as a guide, not to be literally followed, but varied as circumstances may require. If so, there is no difficulty. For the early part of the clause is general, and directs an affidavit, made by a deponent who has the requisite knowledge, to be lodged, and the “form following” only shows how it is to be worded if made by the tenant; but even when made by him, if a tenant for life, to be varied according to circumstances; and if not made by him, but by an agent, to be further varied accordingly.

This is the construction put upon the section by the Judges in Ireland, with which we entirely concur. We answer, therefore, your Lordships’ first question in the affirmative.

As to the two other affidavits, we have had more difficulty. The first is, where two denominations of lands are described as lands both held of Lord Mountcashell, but by different leases; and the trees are described as planted, on the whole together, without distinguishing between the trees planted in each * 952 denomination respectively. We have * doubted much as to this. But on the whole we think the affidavit is sufficient as to these trees. The object is to give information to the superior landlord as to the extent of the planting on his land. It would be more perfect, no doubt, if the trees planted on each denomination were separately enumerated. But inasmuch as both denominations of land are his, he can go on each and examine for himself, having, it must be presumed, full knowledge of their state, and the number of trees thereon before. By knowing the state of the lands before and after, he can tell how many new trees have been planted on each denomination; how many on A., and how many on B., and this information we think may therefore be held to be sufficient. We therefore answer the second question as to the affidavit No. 1, in the affirmative.

As to No. 3, we answer in the negative. There the affidavit extends to two denominations of lands, one held under Lord Mountcashell, and one under Alexander Davison. The affidavit

would be true, if 10,000 trees were planted on the aggregate lands, even though 6500 were planted on Lord Mountcashell's lands, and 3500 on Davison's lands. And so it would be, if the numbers were reversed. How is Lord Mountcashell to ascertain which is true? He knows, it may be said, how many trees were before on his own lands; but he has no such knowledge, nor any means of acquiring it, as of right with respect to the lands of Mr. Davison. The affidavit, therefore, does not give him that information which the statute made the condition of the privilege given to the tenants; whereby the landlord might have upon the records of the sessions a full disclosure of the extent of his rights as to the number and kinds of the trees planted by the tenant. We think, therefore, that this affidavit is bad.

* The result of our opinion is, that as to all the affidavits * 953 except No. 3, we concur in the judgment of the Judges of the Exchequer Chamber of Ireland, but differ from them as to No. 3.

THE LORD CHANCELLOR, after stating the nature of the case. — My Lords, the questions here turn entirely upon the construction of the Irish Act, 23 & 24 Geo. 3, c. 39.

That was an Act passed to encourage tenants or persons having a limited interest in land to plant trees, by enabling them to cut down during their term any that they planted. But as it is obvious that this might give rise to great abuse, the second section provided a security to the landlord. [His Lordship read the section.]

Now, the objections made were these: first of all an objection which applied to all the plantings, except the first, namely, that whereas by the statute it is required that an affidavit shall be made by the tenant, which would be in this case by Lord O'Neill, setting out the right plantings, the affidavit here was made, not by Lord O'Neill himself, but by his agent, Mr. M'Auliffe. That objection appeared to the learned Judges in Ireland to be untenable.

The second objection was, that, with regard to the first planting, the affidavit, though made by Lord O'Neill, stated only that the planting had been upon the lands of Claggan and the lands of Aghafattan, not distinguishing how many trees had been planted upon Claggan and how many upon Aghafattan, and that, consequently, for that reason the register was bad.

The third objection with regard to the third planting was, that

it was stated to be a planting upon two denominations of
 * 954 land, Killycharn and Claggan, the former being * held
 under Mr. Davison, and the latter under Lord Mountcashell.

Those were the objections made. The question which was decided below, and which is now finally to be decided by your Lordships, is, whether any one of those objections is tenable. The case was heard by your Lordships, with the assistance of the learned Judges, to whom three questions were put, and which they have answered.

With regard to the first question, which relates to seven of the plantings, as to which therefore the plea would be bad if the objection is well founded, namely, that the affidavit must be made by the tenant himself, and not by his agent, the learned Judges are all clearly of opinion that the affidavit of the agent is quite sufficient; and in that opinion I most entirely concur. It is to be observed, that the language of the statute is merely that any tenant so planting, "shall within twelve calendar months lodge with the clerk of the peace an affidavit reciting the number and kinds of the trees planted"; if it had stopped there, no doubt could have been entertained that there is no indication as to the person by whom the affidavit is to be made; but then the clause goes on thus: "and the name of the lands in form following: 'I, A. B., do swear that I have planted, or caused to be planted.'" The argument was, that that necessarily shows that the person making the affidavit must be the person who made, or caused to be made, the planting.

In the first place, it is obvious that that would be a requisition with which, in innumerable instances, it would be impossible to comply, because suppose the tenant for life was an infant or a lunatic, or was beyond the sea, he could not make the affidavit. That, therefore, would defeat the object of the statute, which was to encourage planting, and in a great many cases it would
 * 955 make it impossible * that planting should take place, because the proper affidavit could not be made. The question therefore is, the statute not stating by whom the affidavit is to be made, but simply requiring an affidavit to be made, whether your Lordships are bound, because the form given is, "I, A. B., do swear," and so on, to hold that the affidavit must be made by the tenant himself. I think it is very reasonable to hold that that was merely directory, and that your Lordships must so hold, because

the form goes on to say, "And I have given notice to the person or persons under whom I immediately derive"; but this is an affidavit which is to be made not only by a tenant holding at a rent, but by a tenant for life under a settlement, or by a tenant with a partial interest, holding in right of his office; he could not make such an affidavit. Therefore it is quite clear that when the statute says "in the form following," it must mean that it is given only as a form, to be adopted where it can properly and conveniently be adopted, but not as regulating the previous part of the enactment. The agent is, in all human probability, infinitely better able than the party himself to state what planting has been done. And in truth to require the tenant himself to make the affidavit in all cases exactly in this form, would be, in many instances, compelling him to swear, not to what was necessarily false, but to that which he could not by possibility know to be accurately true. I therefore quite concur with the very great majority of the learned Judges below, and with all the learned Judges who heard the case here, that an affidavit by the agent was perfectly sufficient.

Then comes the next objection, which relates to the first planting. There the Court of Exchequer Chamber thought that there was no objection to the affidavit, contrary to what had been the opinion of the Court of Queen's Bench. That was a case in which the trees had been planted upon * two descriptions * 956 of land, both held under the Earl of Mountcashell, by different instruments, and therefore the terms of which would probably expire at different times. I think it might have been a very reasonable thing if the statute had required in such cases that there should be a separate registration for each separate holding. But what we have to say is, whether the statute has or not been complied with. Now the statute only requires that the party shall make an affidavit stating this: (His Lordship read the form.) All that is complied with here, and if the circumstance of there being no separate registry for the plantings upon two denominations may hereafter give rise to inconvenience (although I do not anticipate that that is likely to be the case), all that can be said is, that the Legislature has not provided against that possible evil, and I think, therefore, it would not be safe for your Lordships to say that the party having complied with what the statute does require, is not to have the benefit of it. Upon that head, therefore, also, I concur with the learned Judges who have heard the

case here, and with the opinion of the Court of Exchequer Chamber in Ireland, and that there ought to be judgment for the defendant in error.

Then comes the third objection, which is of a different nature. Here the planting was of trees planted partly upon lands held under the Earl of Mountcashell, and partly upon lands held under another landlord, Mr. Davison. Now, here I think, contrary to the opinion of the Court of Exchequer Chamber in Ireland, but in conformity with the opinion of all the learned Judges here, that the statute has not been complied with. Certainly, the form of the statute has not been complied with, because there is no form given stating a holding under two different landlords. Still the circumstance of the form not having been complied

with, I should not have thought material if the substantial

* 957 * information contemplated had been given. But the substantial information is not given. The landlord is entitled, by the sixth section of the Act, to appeal to the quarter sessions in case there has been any fraudulent registry, that is, if there has been a registry as to his land of more trees than had been really planted there. But he has no possible means of ascertaining what has been planted upon other lands than his own. When the trees are all planted upon his own land, whether the planting is upon one denomination of land or more, is immaterial; but here all the information which is given to him is, that upon two pieces of land, one belonging to him, and one to another person, ten thousand trees, say, have been planted. That would be perfectly true if nine thousand had been planted upon his land, and one thousand upon the other land, or if one thousand had been planted upon his land, and nine thousand upon the other land. He has no means of ascertaining what has been planted on the other lands. He therefore cannot know whether that register truly represents the facts of the case. Consequently, by the form not having been followed, the security intended for the landlord is not given. With regard to that planting, therefore, in my opinion the judgment of the Court of Exchequer Chamber was wrong, and that is the view which has been taken by the learned Judges here.

The jurors were required to find what was the damage sustained by the cutting down of the trees on each of the plantations. And the special verdict found that the damage sustained by the Earl of Mountcashell by reason of the cutting down of the trees

on the third planting was 15s. Therefore, what I must recommend your Lordships to do is, to give judgment for the plaintiff in error as to so much of the verdict as relates to the cutting on the third planting, the damages for which are assessed at 15s., *and for the defendant in error as to the other cuttings. * 958 And with that judgment, the case must be remitted to the Court below.

Judgment given in part for plaintiff in error, and in part for defendant in error.

Lords' Journals, 24th July, 1856.

IN COMMITTEE FOR PRIVILEGES.

1856. February 4, 7, 12, 18, 22, 25.

THE WENSLEYDALE PEERAGE.

Peerages for Life. Jurisdiction of the House on Patents of Peerage. Questions to Judges.

Letters patent were granted by the Crown to a commoner, purporting to create him a baron of the United Kingdom for life, with a seat in Parliament: The letters patent were followed by a writ of summons to Parliament in the usual form.

The House referred it to a Committee for Privileges to examine and consider the letters patent and to report their opinion thereon to the House. This reference was made without any previous reference of the matter by the Crown to the House.

The committee reported "that neither the said letters patent nor the said letters patent with the usual writ of summons issued in pursuance thereof, can entitle the grantee therein named to sit and vote in Parliament.

The House affirmed the resolution.

The committee declined to put a question to the Judges on this matter, which did not involve the validity of the patent for all purposes, but only the right under it to sit and vote in this House.

February 4.

A COPY of the patent, creating the Right Hon. Sir James Parke, Knight, a Baron for life, by the title of Baron Wensleydale, was laid on the table of the House.¹

¹ Victoria, by the Grace of God, of the United Kingdom of Great Britain and

February 7.

* 959 * LORD LYNDHURST moved that the copy of the patent, creating Sir James Parke to the dignity of Baron Wensley-

Ireland, Queen, Defender of the Faith: To all archbishops, dukes, marquesses, earls, viscounts, bishops, barons, knights, provosts, freemen, and all other our officers, ministers, and subjects whatsoever to whom these presents shall come, greeting: Know ye, that we, of our especial grace, certain knowledge, and mere motion, have advanced, preferred, and created our right trusty and well-beloved Councillor Sir James Parke, knight, late one of the barons of our Court of Exchequer, to the state, degree, dignity, and honour of Baron Wensleydale of Wensleydale in the North Riding of our county of York, and him the said Sir James Parke Baron Wensleydale of Wensleydale aforesaid do by these presents create, advance, and prefer, and we have appointed, given, and granted, and by these presents, for us, our heirs and successors, do appoint, give, and grant unto him the said Sir James Parke the name, state, degree, style, dignity, title, and honour of Baron Wensleydale of Wensleydale aforesaid; to have and to hold the said name, state, degree, style, dignity, title, and honour of Baron Wensleydale of Wensleydale aforesaid unto him the said Sir James Parke for and during the term of his natural life: Willing, and by these presents granting, for us, our heirs and successors, that the said Sir James Parke may bear and have the name, state, degree, style, dignity, title, and honour of Baron Wensleydale of Wensleydale aforesaid, and that he may be called and styled by the name of Baron Wensleydale of Wensleydale in the North Riding of our county of York, and that he the said Sir James Parke may in all things be held and deemed Baron Wensleydale of Wensleydale aforesaid, and be treated and reputed as a Baron, and that he may have, hold, and possess a seat, place, and voice in the Parliaments and public assemblies and councils of us, our heirs and successors, within our United Kingdom of Great Britain and Ireland, amongst other barons, as a baron of Parliament, and public assemblies and councils, and also that he the said Sir James Parke may enjoy and use, by the name of Baron Wensleydale of Wensleydale aforesaid, all and singular the rights, privileges, pre-eminences, immunities, and advantages to the degree of a baron in all things duly and of right belonging which other barons of this our United Kingdom of Great Britain and Ireland have heretofore honourably and quietly used and enjoyed, or as they do at present use and enjoy: Lastly, we will, and by these presents, for us, our heirs and successors, do grant to the said Sir James Parke, that these our letters patent, or the enrolment thereof, shall be sufficient and effectual in the law for the dignifying, investing, and really ennobling him the said Sir James Parke with the title, state, dignity, and honour of Baron Wensleydale of Wensleydale aforesaid, and this without any investiture, rights [rites], ornaments, or ceremonies whatsoever in this behalf due and accustomed, which for some certain reasons, best known to us, we could not in due manner do and perform, any ordinance, use, custom, rite, ceremony, prescription, or provision due or used, or to be had, done, or performed, in conferring honours of this kind, or any other matter or thing, to the contrary thereof notwithstanding: We will also, and by these presents grant to the said Sir James Parke, that he may and shall have these our letters patent duly made

dale, which had been laid on the table of the House, be
 * referred to the Committee for Privileges, for consideration * 960
 and examination, and to report thereon to the House. The
 creation of a peerage for life was contrary to the settled usage of
 the last four hundred years, to the principles of the constitution, and
 to the privileges of Parliament. The few instances of such crea-
 tions in troubled times afforded no justification for it; and some
 even of these creations, such as the Marquisate of Dublin and
 Dukedom of Ireland conferred upon the Earl of Oxford,¹ and the
 Dukedom of Aquitaine, conferred on the King's uncle, the Duke
 of Lancaster,² were mere additions of title, the favoured individ-
 uals being already peers of Parliament, so that the new cre-
 ation did not in any way change the composition of the
 * House. Besides which it appeared that these creations * 961
 purported to be made with the assent of Parliament, the
 King sitting in full Parliament at the time of making them; so
 that they could not truly be relied on as instances of the exercise
 of the power of the Crown. The case of Guichard D'Angle,³
 created to the earldom of Huntingdon for life, was likewise no
 authority, for D'Angle being a foreigner, could not sit in the House,
 and his patent appeared to have been cancelled in the following
 year and a large pension bestowed upon him.⁴ The case of the
 Countess Rivers⁵ was one where the Court of King's Bench had
 refused to discharge from custody a lady who had been created for
 life only. Lord Coke's dictum⁶ was not implicitly to be relied on.

and sealed under our great seal of our United Kingdom of Great Britain and
 Ireland, without fine or fee, great or small, to be for the same in any manner ren-
 dered, done, or paid to us in our Hanaper, or elsewhere to our use. In witness
 whereof, we have caused these our letters to be made patent. Witness ourself at
 Westminster, the sixteenth day of January, in the nineteenth year of our reign.

By Warrant under the Queen's Sign Manual.

C. ROMILLY.

¹ Rot. Parl. 9 Rd. II. No. 17. The references to the peerage cases mentioned
 in this discussion are more fully given in the evidence, post 970 et seq.; they are
 set out at length in the "Minutes of Evidence," printed by the House in three
 papers marked (18), (18.^a), (18.^b). They are also printed in the Appendix to
 the Report on the Dignity of a Peer.

² Rot. Parl. 13 Rd. II. Nos. 21 and 22.

³ Rot. Parl. 1 Rd. II. (A. D. 1377), No. 29.

⁴ Rep. on the Dignity of a Peer, Vol. 2, p. 189.

⁵ Style, 234.

⁶ 9 Rep. 95 - 97.

In two peerage cases in this House,¹ his opinion on a different point, given with equal positiveness, was overruled. In the *Purbeck Case*² the power of the Crown to create life peers was assumed by way of illustration in argument, but the Earl of Shaftesbury, who had just resigned the great seal to the Earl of Nottingham, described the assumption as that of "a point of greater consequence than the thing in debate"; (which thing was, nevertheless, a question as to the power of a peer to surrender his patent,) and Lord Nottingham, who was then Chancellor, did not say a word in support of it. The power of the Crown, whatever it might have been in former times, even assuming that such a power had ever existed, which, however, the precedents did not satisfactorily show, was now lost by desuetude. The general * 962 rule, *nullum tempus occurrit regi*, did not apply to * a case like this, and no one would contend that, in virtue of that rule, the Crown might now do what it had once done, summon boroughs and counties to send members to the House of Commons, or, at its pleasure, omit such summonses. That power had fallen into desuetude, and so likewise had the power (if indeed it was ever exercised) of giving a seat in this House by the grant of a life peerage.

Earl Granville maintained that the power of the Crown to create peers for life had existed, had been frequently exercised, and was not lost. *Lady Rivers's Case*³ was no authority the other way. Though the point of peerage for life was mentioned in the argument, the decision did not appear to proceed on it. Lord Coke's authority on this subject was great, and in *Sir George Reynel's Case*⁴ the declaration was made by the Chief Justice himself, by the Chief Baron, and by Justice Warburton, that "without question the King may create an earl for life in tail or fee." To the same effect in *Lord Abergavenny's Case*⁵ it was said: "If the King creates any baron by letters patent under the Great Seal, to him and his heirs, or to him and his heirs of his body, or for life, &c., there he is a nobleman presently, and he ought to have a writ of summons to Parliament of right and of course." And Blackstone

¹ The Earl of Devon's Case, 2 Dow & C. 200; The Earl of Waterford Claim, 6 Clark & F. 133.

² Collins's Baronies by Writ, 293, 304, Show. P. C. 1.

³ Style, 234.

⁴ 9 Rep. 95, 97; Co. Litt. 16 b (e).

⁵ 12 Rep. 70.

said that the King may create either men or women noble for life. Selden¹ plainly agreed with Lord Coke. So did Comyn,² and the present Lord Chief Justice of the Court of Queen's Bench, in speaking in 1851 on the question of certain law officers being admitted, by virtue of their offices, to be peers of this House, had said :³ "The Crown might create by its prerogative a peerage for life." Even the noble and learned *Lord who *963 moved this matter had not stated that such a creation was illegal, but had confined himself to saying that it was lost by desuetude. But that constitutional principle did not apply to a great prerogative authority like this. The Crown was the fountain of honors, and the mere nonpractice of one particular form of bestowing them did not affect the Crown's right to recur to it.

LORD ST. LEONARDS said that such a creation was, in his opinion, illegal. In ancient times the creation of a barony by writ of summons did not, as Lord Coke erroneously stated in one place, confer an estate in fee simple, but as he more correctly elsewhere explained it, ennobled the blood so as to include all heirs lineal. The case of Lord Hay and the other case of Guichard Dangle explained how the opinion that life peerages might be created had arisen. They were instances of such creations, but in Lord Hay's patent the grantee was expressly excluded from the right of sitting and voting in Parliament. It was unsafe at this time of day to rely upon any ancient grant of peerage not supported by the general law and not followed in later times. Otherwise the precedent of Edward the 4th in 1479, creating the Prince of Wales Earl of March, to hold during the King's pleasure, might be acted on.⁴ In the case of the Earl of Kendal, created Duke of Bedford in the reign of Henry the 5th, that creation did not take place by the prerogative of the King alone, but was made in Parliament.⁵ That was the case also with the marquissate of Dublin, and with the dukedom of Aquitaine, which latter besides did not affect the English but only the French peerage. In the cases of the creations of the Earl of Kendal and the Duke of Gloucester for life, it appeared that their peerages were not long afterwards extended to their heirs male, and, as to that of the *Earl *964 of Cambridge, it was singular, if only a life estate was

¹ Tit. of Honor, part 2, c. 5, § 10 (ed. 1631), p. 666.

² Com. Dig. Tit. "Dignity."

³ Hansard, 27 June, 1851. .

⁴ Rep. Dignity of a Peer, V. 419.

⁵ Rep. Dignity of a Peer, III. 197.

intended, that the words "during his life" were not added as in the two former cases. There was good reason to suppose that that was meant to be a grant in fee. The creation, in 1417, of the Earl of Warwick to be Earl of Albemarle or Aumale for life was unimportant; it was a mere honorary creation, and could not affect the peerage, as the grantee had already a seat in the House by an earlier title. Then came the grants to Sir J. Cornwall, created Baron Faunhope and Baron Milbroke. In one case the creation was without words of limitation, so that it might have operated as a creation with descent to heirs general, and both creations were made by assent of Parliament. The case of the Earl of Thomond was not applicable. In the first place it was an Irish, not an English peerage, and in the next, though the earldom was granted for life, the barony was granted to him and his heirs male, and under that grant he could sit in the House of Peers, though the other grant would give him a higher nominal title.

The Lord Chancellor denied the power of the House, without a reference from the Crown,¹ to question the validity of a grant of peerage by the Crown. Other rights, besides those of sitting and voting, here depended on such a grant. In the case of Knollys claiming to be Earl of Banbury,² a person indicted for a murder pleaded that he was a peer; there was a replication that it had been adjudicated in Parliament that he was not a peer, but Lord Chief Justice Holt, and the Court held that that must be decided by the patent, independently of the decision of the House, and the indictment was abated. The decision here would, in reality, decide nothing. The Queen might grant Lord Wensley-

* 965 dale a writ of summons, without any * patent; for a patent and a writ of summons might be independent of each other. Lord Wensleydale had here received a writ of summons which he was bound to obey, and which entitled him to a seat in this House. In the *Duke of Hamilton's Case* this House took upon itself, in 1711, without reference from the Crown, to deny the validity of a patent, creating him Duke of Brandon, but in 1782 all the proceedings then had were treated as nugatory; the claim was formally brought before the House by reference from the Crown, was argued with the Judges in attendance, and the House then deliberately overruled the decision of 1711. The

¹ Per Holt, *C. J. Rex v. Knollys Case*, 1 *Ld. Raym.* 16.

² 2 *Salk.* 509, 1 *Ld. Raym.* 10.

opinion of Lord Coke was fully warranted by the authorities, and had been adopted by all subsequent text writers ; and in the copy of Coke upon Littleton, once in the possession of Sir Matthew Hale, and now in Lincoln's Inn Library, there was a commentary by Hale on this very passage of Coke, but not one word appeared there to call the opinion of Coke into question. Sir Matthew Hale might, therefore, be considered an additional authority in favour of that opinion. Mr. Hargrave had also left the passage unquestioned. Mr. Justice Doderidge, a great authority on such matters, in speaking of the dignity of a baron, said : ¹ " This kind of dignity shall be of such continuance as shall be limited in the *habend*, sometimes for life, sometimes *per auter vie*, as some hold opinion." In like manner the Report on the Dignity of a Peer, prepared under the careful superintendence of Lord Redesdale,² referred to the assertion that persons to whom dignities had been granted by the Crown had usually had therein rights of inheritance, and said that this assertion must be understood as not extending to every dignity, particularly the dignity of knighthood, which had never been enjoyed hereditarily, or * even * 966 to the dignity of peerage, where the terms of the instrument by which it had been created expressed the contrary. The grant to Guichard D'Angle was, no doubt, objected to, not because it was limited for life, but because there was a money charge in it, which the Crown did not possess the power to make. Certain it was that writs of summons were issued to him to attend the Parliaments in the first, second, and third years of Richard 2, as Earl of Huntingdon.³ Lord Redesdale, in the report already quoted, referred to the creation of Edward, the son of the Duke of York, as Earl of Rutland for the life, not of himself, but of his father, and described the grant and its legal effects, but did not suggest one word as to its invalidity.⁴ He referred to the other cases in the same manner. And all these peers received writs of summons to Parliament. There was no distinction, in point of principle, between the right of the Crown to grant life peerages to men, and to grant them to women. There had been many

¹ " Treatise of the Nobilitie," &c., p. 104.

² Rep. 1822.

³ App. to Rep. Dignity of a Peer, Vol. IV. (1829, No. 120), *Summonitiones*, pp. 674, 677, 681 – 683.

⁴ Rep. Dignity of a Peer, Vol. II. (1829, No. 118), p. 191.

instances of the latter in recent times. Lord Clarendon passed two such peerages under the great seal; Lord Shaftesbury, one; Lord Nottingham, four; Lord Cowper, one; Lord Macclesfield, five; and Lord Hardwicke, one. In point of principle there was no distinction between grants of peerages for life and grants of peerages to individuals, with remainders to collaterals; for in truth there could be in law no remainder in a peerage; every remainder, as it was called, being in law a new grant.¹ A grant to a man and his heirs, by a particular wife, was in substance a peerage for his life, for if that wife died without issue the

* 967 peerage would expire on the * death of the first grantee.

Yet no one had ever thought of denying the validity of these creations. The practice of such creations continued up to the present day, and neither in principle nor in fact was there any reason to deny the power exercised in this case by the Crown.

LORD CAMPBELL contended that the House had a right of its own authority to inquire into a new patent, though it might have no power to examine into the claim of an old peerage except upon reference from the Crown, and therefore it was that in the *Banbury Case* Lord Chief Justice Holt did quite right in disregarding the decision of the House, which had been made without any such reference. As to an old peerage, the Crown might act on the sole advice of the Attorney-General, and it had done so not many years since when the Earl of Huntingdon received a summons to Parliament on the report of Sir Vicary Gibbs as Attorney-General. It was not correct to say that the grantee here might claim to sit in virtue of his writ of summons, for that writ could only be a summons to attend in conformity with his patent. The patent, therefore, must be referred to for the purpose of determining what were his rights with regard to sitting and voting in this House. It might be admitted that the decision in the *Hamilton Case* in 1711 was erroneous, but it never was questioned upon the ground that it was made without a reference by the Crown, and, till reversed in 1782, the decision itself was allowed to settle the law. He would not positively say that this creation was illegal, but the more he investigated and deliberated, the more reason he saw to entertain doubt upon the subject of its legality. There was no necessity for this House to declare that the patent was utterly void, so that the other rights depending upon it could remain untouched,

¹ Per Lord Shaftesbury, Viscount Purbeck's Case, 1 Show. P. C. 11.

but the question which the House had a right to determine was, whether the patent gave the grantee a right to sit and vote in this House. Whatever might have * been the practice * 968 in former times, the authority to create peers for life had been lost by desuetude. In the *Countess of Rivers's Case*,¹ the discharge from arrest on the ground of privilege of peerage was refused, and the question whether a patent for life would confer such a privilege had clearly been under the consideration of the Court. The instances of peerages granted to ladies could not affect this question. The creation of a peerage with a remainder different from the heir at law of the grantee, such as that of Earl Wilton or Earl Vane, was no doubt lawful; but those were hereditary peerages in their inception, with a defined line of devolution, in conformity with the rules of the common law. The principle of the constitution was adverse to peerages for life, though there might have been some instances of them in ancient times. There had been also instances of surrenders of patents; yet when the question was fairly brought under the consideration of this House, it was decided that surrenders of patents were illegal. There had been an instance of a creation of an Earl of March to hold "during pleasure,"² but nobody would pretend that if such a patent was now granted, it could be maintained. There had been instances, too, of husbands summoned to Parliament in right of their wives, but that could not be justified at the present day. So in former times persons were summoned, and then not summoned again, and there had been an instance of a peer prevented from exercising his rights as a peer because of his poverty, but no one would now contend that the Crown could capriciously withhold a summons from the hereditary representative of a peer, or that a peer could now be excluded by the Crown from sitting in Parliament on account of his want of ample means to support the dignity. In like manner barony by tenure could no longer be sustained, nor would the Judges think of presenting themselves * in that House, and claiming as of right to sit there * 969 to decide appeals and writs of error, though it was believed that in ancient times they spoke and voted on such matters. These practices, if ever lawful, had now fallen into desuetude. The observation quoted from himself as to peerages for life, supposed to have been uttered in the debate in 1851, was uttered

¹ Style, 234.² Rep. Dig. Peer. V. p. 419.

without the opportunity for consideration, and therefore was not to be relied on as a binding authority. The opinion referred to as that of Mr. Justice Doderidge did not appear with certainty to be his, and was not sustainable in one part at least, that which related to the grant of a peerage *pur autre vie*,¹ and the creation of the Earl of Rutland for the life of his father, the Duke of York, did not furnish an instance in justification of it, for he was to succeed to his father's title. The creation in his case, therefore, resembled the practice of calling up an eldest son in his father's lifetime.

EARL GREY did not think that the patent here could control the writ, for the patent was not recited in it. Each was independent of the other.

THE EARL OF DERBY maintained the right of the House of its own authority to inquire into the patent, and contended that a peerage for life was now opposed to the principles of the constitution.

LORD BROUGHAM supported the motion, the rejection of which he said would amount to a declaration of the House that life peerages were valid. Things might be legal and yet unconstitutional.

The Lords divided, — Contents . . .	Present . . .	79	} 138
	Proxies . . .	59	
Not Contents, . . .	Present . . .	53	} 105
	Proxies . . .	52	
Majority . . .		33	

12 February.

* 970 * The Committee for Privileges assembled. — Lord Redesdale in the Chair. — LORD LYNTHURST stated his intention to produce evidence to show that within the last four hundred years there was not one instance of a commoner with a peerage for life taking his seat in this House; and also evidence to establish that, on several occasions, the House, of its own will, and without any reference from the Crown, had directed committees for privileges to examine and report on patents of peerages.

LORD CAMPBELL intended to move, when the House was reconstituted, as the motion could not be made in committee, that

¹ See the observations of Lord Wynford, Earl of Devon's Case, 2 Dow & C. 200.

notice should be given to Sir J. Parke ; he had a right to be present, as the *Hamilton Case*¹ showed, and that he should sit and speak from the Woolsack.

LORD ST. LEONARDS thought that there would be a difficulty in that matter. In the *Hamilton Case* there were counsel for three parties, the claimant, the Crown, and the House. Here the claim was not watched by the Crown, for the Crown was in favour of the grant.

Henry James Sharpe, Esq., the keeper of the records, from the Tower, produced the following documents : —

The charter roll of the 1 Richard 2 (1377), containing the creation of Guichard D'Angle as Earl of Huntingdon for life.

The Parliament roll of the 9 Richard 2, containing the creation of Robert De Vere Earl of Oxford to be Marquis of Dublin for life. There was a grant of revenues with this creation. The Earl was to "govern the land for two years at our costs and expenses as reasonably agreed on, and after the completion of the said two years sustain and maintain the same at his own costs and expenses during his life aforesaid." The charter declared that this was done by the King in full Parliament, and the nobles and commons * being present, he did "ratify, &c. * 971 the same, as far as in him lay, to the aforesaid marquis for his life, in form aforesaid." In the 9 & 10 Richard 2, there was another grant of revenues, but in the margin of it there was a statement that in Acts of the tenth year this patent was "restored to be cancelled," and the Earl was advanced to be Duke of Ireland (with large grants attached), "to have and to hold to the same Duke of Ireland, to us, and our heirs, so long as he shall live, by his homage liege only." There was then a grant to the Duke and his heirs "upon liege homage only" of "all the lands which he shall be able to conquer, &c." This also was a grant made in Parliament with the assent of the nobles and commons.

The Parliament roll 13 Richard 2, containing the creation of the Duke of Lancaster as Duke of Aquitaine for life.

The charter roll of the 21 Richard 2, containing the creation (in Parliament) of Margaret Countess of Norfolk as Duchess of Norfolk for life, with a grant of forty marks a year.

The patent roll of the 2 Henry 5, containing the creation (in Parliament) of John of Lancaster as Earl of Kendal and Duke of

¹ Lords' Journals, 18 December, 1711.

Bedford for life, with grant of 20*l.* for the earldom and 40*l.* for the d kedom.

The patent roll of 2 Henry 5, containing the creation of Humfrey of Lancaster as Earl of Pembroke and Duke of Gloucester for life, with exactly similar grants.

The patent roll of the 2 Henry 5, declaring the creation of Richard of York as Earl of Cambridge.

The patent roll of the 4 Henry 5, containing the creation of Thomas Earl of Dorset as Duke of Exeter "for his natural life only," with a grant of 40*l.* a year.

The patent roll of the 10 Henry 6, and the patent roll of the 11 Henry 6, and the Parliament roll of the 20 Henry 6, * 972 containing the creation of Sir John Cornewall * first as Baron Faunhope and then as Baron Milbroke, with seat in Parliament, but without limitation of tenure.

The patent roll of the 11 Henry 6, containing a patent to the Duke of Bedford; and the patent roll 21 Henry 6, containing a patent to the Earl of Suffolk and Alice his wife. The former recited a grant, in the second year of the late king, of the dignity of Earl of Kendal and Duke of Bedford for life, and a grant of 20*l.* and of 40*l.* for life, out of the issues of the county of Bedford, to support the same; and the surrender of this grant, and a grant of the same honours to him and the heirs male of his body. The latter was a grant to the Earl of Suffolk and Alice his wife, in case of the death of Humfrey Duke of Gloucester, to hold to them and the heirs male of their bodies the earldom of Pembroke.

The witness was ordered to withdraw.

THE LORD CHANCELLOR intimated that it was the intention of Lord Wensleydale, as soon as his state of health would permit, to present himself and claim his seat. He had not only received a patent of creation, but a writ of summons to Parliament; and that writ he was bound to obey.

LORD ST. LEONARDS. — The issuing of the patent puts the grantee of the honour in a different position from that in which he would stand if a writ of summons alone had been issued to him. In the latter case no word as to descent is used, and the honours would descend to heirs general.¹ In the former the descent was

¹ The point whether a writ of summons created a descendible peerage is now under consideration in the claim of Sir. H. Bedingfield to the Barony of Grandison.

specified; and the appearance of Lord Wensleydale, and his claim of a seat, would be a surprise on the Crown itself, which had not intended by the writ of summons to give him a peerage descendible to heirs general.

* LORD CAMPBELL suggested that notice should be given *973 that the claimant might be heard, by himself or by his counsel at the bar, in support of his claim.

THE LORD CHANCELLOR. — Lord Wensleydale will decline to appear here in that manner.¹ This case is *coram non judice*: it has not been referred by her Majesty to the House.

LORD CAMPBELL. — That does not dispense with the necessity for the House to observe the regular form of proceeding.

Adjourned. .

18 February.

The committee again sat.

Henry Stone Smith, Esq., chief clerk in the Parliament office, produced the Journals of the House from 1660 to 1697, many extracts from which were read.² These extracts related to claims of peerages investigated by the Committee for Privileges under order of the House. The first set of extracts related to the Banbury peerage: 13th July, 1660, "It was moved, 'That there being a person that now sits in this House as a peer, who, as is conceived, hath no title to be a peer, videlicet, the Earl of Banbury,' It is ordered that this business shall be heard by counsel at the bar, Monday come sevensnight."

On the 6th June, 1661, the claimant having petitioned the king, the petition was "by his Majesty's order delivered to the House to consider of."

26th October, 1669. "Upon the calling of the House this day, the House taking notice, 'That the Earl of Banbury's name is not in the list by which the lords were called,' It is ordered, that it be referred to the Committee for Privileges, &c."

* In January, 1697, a petition by the claimant was pre- *974 sented to the king, and referred by the king to the House.

On the 3d February, 1697, a Representation was drawn up by the lords to be presented to the king, "in relation to the proceedings of this House upon the petition of a person who claims the title

¹ A letter from Lord Wensleydale, declining to appear by counsel, was read at a subsequent meeting of the committee.

² Evidence, Wensleydale Peerage (18.³).

of Earl of Banbury." This Representation set forth the reference to the House on the claimant's petition to the king; a subsequent petition from the claimant to the House, praying that he, "being indicted for the death of Philip Lawson, might be admitted to his trial by his peers," and the resolution of the House thereon, "That the petitioner had no right to the title of Earl of Banbury."

An extract from the Journals of the 25th November, 1661, was read, from which it appeared that "the name of Viscount Purbeck not being in the list of the names of the lords by which this House was called this day, It is ordered, that it be referred to a Committee for Privileges, to consider whether he be to sit in this House as a peer or not."

On the 18th August, 1660, "Upon information to the House, by the Marquis of Hertford, that a patent is granted to the Marquis of Worcester, which is a prejudice to other peers, It is ordered, that the consideration of the said patent is referred to the consideration of these lords following." Then follows a list of twenty-nine peers, with power to send for persons and "the patent." On the 20th August the Lord Chief Baron and the Attorney-General were ordered to attend to advise "the Lords Committees in point of law concerning the Marquis of Worcester's patent." The patent was to create the Marquis of Worcester to be "Duke of Somerset on certain conditions on his part to be performed, which he hath not performed." Other proceedings were taken, and on the 3d of September the Marquis "delivered up the patent to his Majesty for the dukedom of Somerset."

* 975 *The Journals of the 12th November, 1694, were produced, from which it appeared, that on that day an order was made to refer it to the Committee for Privileges to consider, "whether, if a lord called by writ into his father's barony shall happen to die in the lifetime of his father, the son of that lord (so called) be a peer, and hath right to demand his writ of summons?" The Lords reported that "they find no precedent in this case"; and a debate arising on this report, so far as it was applicable to the case of "Charles Lord Clifford (son and heir of Charles Lord Clifford of Launsburgh, who was called by writ to Parliament in the lifetime of his father, the present Earl of Burlington)," the House decided that he was entitled to a writ of summons as Lord Clifford of Launsburgh.

On the 16th March, 1694, "after hearing the Attorney-General in relation to baronies by descent, whose ancestors were called by writ, as also counsel in behalf of several peers of this House who think themselves concerned therein," consideration of the matter was adjourned. On further debate, on the 19th March, 1694, "This question was put, 'Whether if a person summoned to Parliament by writ, and sitting, die, leaving issue two or more daughters, who all die, one of them only leaving issue, such issue has a right to demand a summons to Parliament?'" and it was resolved in the affirmative, Lords Grey and Culpeper dissentient. A protest was afterwards entered against the resolution, signed by the Duke of Norfolk, E. M., and the Lords Bridgewater, Brooke, Herbert, Rochester, Scarbrough, and Torrington.

On the 2d March, 1710, the House referred it to a Committee to consider whether the Duke of Ormonde, under the title of Lord Dingwall, of Scotland, should be placed in the list of the nobility of that kingdom after Lord Madderley. On the 10th July, 1710, the committee reported *that his place was *976 "immediately before the Lord Cranstoun."

On the 12th December, 1711, "Notice being taken 'that in the list of nobility delivered by Garter King at Arms, there is inserted James Hamilton, Duke of Hamilton and Brandon, amongst the dukes,' and the House being informed that a patent is lately passed the great seal for creating the said Duke of Hamilton Duke of Brandon," it was "Ordered that on the 20th instant this House will take the patent into consideration," and that "the privy seal bill of the patent be laid before this House." The Judges were ordered to attend. The Duke of Hamilton was heard by counsel, and the privy seal bill and enrolment were read. After several questions proposed, the following was resolved in the affirmative: "That no patent of honour granted to any peer of Great Britain who was a peer of Scotland at the time of the Union, can entitle such peer to sit and vote in Parliament, or to sit upon the trial of peers."

A protest was entered against this decision, signed Ormonde, Oxford and Mortimer, Winchilsea, Harcourt, C. S., Rivers, Blantyre, Poulett, Mar, Loudoun, Roseberrie, Ilay, Boyle, Home, Orkney, Balmerino, Hunsdon, Osborne, Kilsyth, Clarendon."

On the 14th June, 1781, "A petition of the most noble Douglas Duke of Hamilton and Brandon," praying for a writ of summons

as such, in virtue of the creation by Queen Anne, was presented to his Majesty, and, together with the Attorney-General's report thereon, was by his Majesty referred to the House. A Committee for Privileges sat on the 6th June, 1782; the Judges attended; and after counsel for the claimant and for the Crown had been heard, the question was put to the Judges, "Whether by the twenty-third article of the Act of Union, which declares all
 *977 peers *of Scotland to be peers of Great Britain, with all the privileges enjoyed by the peers of England, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon, the peers of Scotland be disabled from receiving, subsequently to the Union, a peerage of Great Britain, with all the privileges usually incident thereto." The Lord Chief Baron delivered the unanimous opinion of the Judges, that "they are not disabled" from receiving such patent. The House afterwards presented a report to the king, certifying "our humble opinion and advice that the said Duke of Brandon is entitled to his writ of summons."

The third volume of the printed Rolls of Parliament was produced, and an entry of the 21st Richard 2, entitled, "Prefection des Ducs," was read. This document described the creation, by the king "sitting in Parliament crowned in his royal Majesty," of Henry of Lancaster, Earl of Derby, to be Duke of Hereford, "to hold to him and the heirs male of his body, &c. Also, on the same day, and in the same form and manner," were the creations of Edward, Earl of Rutland, to be Duke of Albemarle; of Thomas, Earl of Kent, to be Duke of Surrey; of John, Earl of Huntingdon, to be Duke of Exeter; of Thomas, Earl of Nottingham, to be Duke of Norfolk; of Margaret, Countess of Norfolk, to be "Duchess of Norfolk for her life, and upon this hath sent to her his charter of creation abovesaid"; also of John, Earl of Somerset, to be Marquis of Dorset; of Sir Thomas Le Despenser, to be Earl of Gloucester; of Sir Ralf De Nevill, to be Earl of Westmoreland; of Sir Thomas de Percy, to be Earl of Worcester; and of Sir W. Le Scrop, to be Earl of Wiltshire. No term of tenure was mentioned in any one of the last five creations.

LORD LYNDHURST gave notice that at the conclusion of the
 *978 evidence he should move that the committee do agree *to the following report: "The committee have, as directed by the House, examined and considered the copy of the letters

patent, purporting to create the Right Hon. Sir James Parke, knt., a baron of the United Kingdom for life; and they report it as their opinion that neither the said letters patent nor the said letters patent with the writ of summons issued in pursuance thereof, can entitle the grantee therein named to sit and vote in Parliament."

Adjourned.

19 February.

H. S. Smith, Esq., produced Appendix V. to the Fifth Report on the Dignity of a Peer, from which was read an entry from the patent roll, 11 Henry 6, relating to Humphrey, Duke of Gloucester.¹ The patent recited the grant by Henry V. to "his most dear brother Humfrey, Duke of Gloucester, of the alien priory of Pembroke, with the appurtenances, to have to him and the heirs of his body," during the war with France, together with a grant of issues to support the dignity; then the patent made in Parliament, "with the assent of the prelates, nobles, and commons," advancing "his aforesaid brother to be Earl of Pembroke, and after that to be Duke of Gloucester; to have and hold to his same brother the styles, honours, and names of Earl and Duke aforesaid for the whole of his natural life"; and furthermore a grant for his life of 20*l.* a year to support the earldom and 40*l.* a year to support the dukedom; that a peace was concluded between France and England; that no issues had been received by the Crown to pay the said two sums; that the said Earl and Duke had "restored to us in our Chancery to be cancelled the said letters, as well of his advancement to be Earl and Duke, as of the priory," and then followed a grant of the honours, and of the * revenues, to "our aforesaid uncle and the heirs male of * 979 his body for ever," both made with the assent of Lords and Commons in Parliament.

Mr. Smith also produced the Journals of this House for 1692, with entries, showing the proceedings of the House in the case of the Earl of Lincoln's writ and patent.² On the 25th January, 1692, it was "Ordered by the Lords spiritual and temporal in Parliament assembled, it shall be, and it is hereby referred to the Lords Committees for Privileges to inspect the patent of the Earl of Lincoln and his pedigree, and report their opinion thereon to this

¹ Evidence, Wensleydale Peerage (18.⁵), p. 87.

² Evidence, &c. (18.⁵), p. 91.

House." The report made two days afterwards declared "the pedigree is clear," and the Earl took his seat.

Henry J. Sharpe, Esq., produced from the Rolls Chapel the patent rolls of the 4 James 1, containing a patent, which created "James Hay, knight, serjeant of our chamber," a peer for life. The patent recited the services of Sir James Hay, and proceeded thus: "Of our especial grace, &c. we do will and grant that the said James Hay, during his life, in all places and honourable assemblies within our realm of England, as well in our presence as elsewhere, other than in our Parliaments, may have and obtain a seat in the place next to the barons and magnates of this our realm of England, and may have place, take precedence of, and sit before all other knights and gentlemen whomsoever in our said realm of England during his life, other than those being barons and of superior ranks in our realm of England, and that he be in all respects accounted as a baron, the liberty of voting and sitting in Parliament excepted. We will also that the aforesaid James Hay shall be acknowledged, accounted, and called Lord Hay, and shall make use of and enjoy the same style, title, and honour, except as before excepted, during his life."

* 980 * The patent rolls of the 13 James 1 were produced; they contained the creation of the same person to be Baron Hay of Sawley, with succession to the heirs male of his body.

Mr. Smith also produced the patent rolls of the 35 Henry 8, creating "Murrough Obreen to be Earl of Tomon" [Thomond] "in our kingdom of Ireland, with place and voice in our Parliaments, in our aforesaid kingdom of Ireland," "for the term of his life." The patent further granted that after the decease of Murrough Obreen "the aforesaid name, style, dignity, honour, &c. do remain to that most approved man, our subject Donagh Obreen, to have to the same Donagh Obreen for term of his life." The patent went on thus: "And furthermore of our more abundant special grace, the aforesaid Murrough Obreen to be a baron of the Parliament of our kingdom of Ireland, we do ordain, appoint, create and constitute by these presents, and the title, name and style of Baron Inskwyne [Inchiquin], in our kingdom of Ireland aforesaid, and seat in singular the Parliaments within the said kingdom of Ireland hereafter to be assembled, and other our rights, &c. of the same kingdom to the barons of the same, &c., we do give and grant; and we will that he do enjoy the aforesaid name,

&c. of Insykwyne, with all honours, pre-eminences, prerogatives, commodities, and other the premises to the same belonging, to the aforesaid Murrough Obreen, and the heirs male of his body lawfully begotten." Then because honours created greater expenses, there followed a grant to Murrough Obreen of certain revenues to support the same, the grant being to "Murrough Obreen, and the heirs male of his body," &c., to be held by knight service.

Mr. Sharpe also produced the patent roll of the 35 Henry 8, part 6, containing a grant to Donagh Obreen. After reciting his eminent services, the patent proceeded: "Him, the said Donagh Obreen, Baron of Ibrackayn, in our *aforesaid *981 kingdom of Ireland, we do ordain, appoint, create, and constitute by these presents, and the title, name, and style of Baron of Ibrackayn, in our aforesaid kingdom of Ireland, and seat in singular the Parliaments within the said our kingdom of Ireland hereafter to be assembled, and other our rights and privileges of the same kingdom to the barons of the same by law and custom, or by any other means pertaining, to the same Donagh Obreen, we do give and grant," &c. It then recited the grant to Murrough Obreen of the earldom of Tomon, "for the term of his life, remainder thereupon immediately after his decease to the aforesaid Donagh Obreen for the term of his life," and went on to grant, "by these presents to the aforesaid Donagh that he immediately after the death of the aforesaid Murrough Obreen shall be Earl of Tomon, and have the estate, title, style, honour, and dignity of Earl Tomon, with all pre-eminences," &c., "for the term of his life." Then followed a grant to maintain the state of Baron of Ibrackayn.

22 February.

LORD GLENELG moved that the following questions be put to the Judges: 1. Is it in the power of the Crown to create, by patent, the dignity of a baron of the United Kingdom for life? 2. What rights and privileges does such a grant confer?

This was objected to on the ground that the present inquiry did not involve any other question than that of a right to sit and vote in the House, which was not a question of mere law.

After debate the motion was negatived by one hundred and forty-two to one hundred and eleven.

The House then resolved itself into a Committee for Privileges.

Mr. Thomas Edlyne Tomlins deposed that he had examined the records at the Rolls Chapel, from the reign of Richard 2 * 982 to the end of that of Queen Mary inclusive, * and only found the entry of the creations of Murrough and Donagh O'Brien (Obreen) for life.

LORD LYNDEHURST then moved that the committee do agree to the following report: "The committee have, as directed by the House, examined and considered the copy of the letters patent, purporting to create the Right Hon. Sir James Parke, knight, a baron of the United Kingdom for life; and they report it as their opinion that neither the said letters patent, nor the said letters, with the usual writ of summons issued in pursuance thereof, can entitle the grantee therein named to sit and vote in Parliament."

EARL GREY moved an amendment, "To leave out all the words after the word 'opinion' for the purpose of inserting the following words, viz.: 'That the highest legal authorities having declared the Crown to possess the power of creating peerages for life, and this power having in some cases been exercised in former times, the House of Lords would not be justified in assuming the illegality of the patent, creating the Right Hon. Sir James Parke Baron Wensleydale, for life, and in refusing, upon that assumption, to permit him to take his seat as a peer.'"

After long debate on the question "Whether the words proposed to be left out shall stand part of the question?" it was resolved in the affirmative by ninety-two to fifty-seven. The original motion was then agreed to, and the report was ordered to be made to the House.

25 February.

The report of the committee was presented, and after debate agreed to. And it was by the House resolved and adjudged accordingly.

INDEX.

ADMIRALTY, COURT OF.

In an action by a shipowner against the charterers for freight, the charterers pleaded that after the freight had been earned, and after the commencement of the suit, the obligee of a bottomry bond, by which ship and freight were hypothecated, instituted in the Court of Admiralty a suit against ship and freight, whereon a monition issued, commanding the plaintiff to bring into Court the proceeds of the wreck and stores of the ship, and the defendants to bring into Court the money due for freight, to abide the judgment of the Court, and that the defendants had done so: — *Held*, affirming the judgments of the Courts of Exchequer and Exchequer Chamber, that this was a good plea in bar to the action. — *Plan v. Potts*, 383.

Construction of the 3 & 4 Vict. c. 65. — *Id.*

AFFIDAVIT.

1. The 23 & 24 Geo. 3, c. 39 (Ir.), gives, by § 1, to “any tenant for life or lives, by settlement, dower, or courtesy, jointure, lease, or office civil, military, or ecclesiastical, impeachable of waste, or any tenant for years exceeding fourteen years unexpired, who shall plant, or cause to be planted, any timber trees,” &c., the right to cut the same during the term. The second section provides, “that any tenant so planting,” &c. shall, within twelve months, lodge with the clerk of the peace of the county an affidavit, “reciting the number and kinds of the trees planted, and the name of the lands, in form following.” The form given is, “I, A. B., do swear that I have planted, or caused to be planted, on the lands of _____, held by me from _____, and “that I have given notice to the person under whom I immediately derive, or his agent, of my intention to register.” A. held lands from B. under leases for lives, on different demises granted by B.’s ancestor to A.’s ancestor: A. planted trees, and made the affidavit, * but mentioned lands held under different * 984 demises, and did not distinguish the number of trees planted on each land: — *Held*, that the second section of the statute included a tenant for life, and that the affidavit was sufficient. — *Mountcashell v. O’Neill*, 937: *Held*, also, that under this statute an affidavit might be made by the agent and manager of A., for and on behalf of A. — *Id.*

2. A. also occupied lands under C. adjoining to those of B.; A.’s agent made an affidavit, including both descriptions of lands, and giving the

gross number of the trees planted, but not distinguishing the number planted on the land of B. from those planted on the land of C.: — *Held* insufficient. — *Id.*

AGENT. See AFFIDAVIT.

AGREEMENT. See CONTRACT, COMPANY, DIRECTORS, EQUITY, SOLICITOR AND CLIENT.

ANNUITIES. See WILL, 2.

APPEAL. See PRACTICE.

ARBITRATION. See CONTRACT.

ARMS. See WILL, 4.

ARRANGEMENT, DEED OF. See BANKRUPTCY.

ARREST. See PRACTICE.

ATTORNEY-GENERAL.

Quære. Whether, where the validity of an existing grant of a peerage is questioned, the Attorney-General is bound to appear to support it? — *Fermoy Peerage*, 716.

AWARD. See CONTRACT.

BANKERS.

Trustees of a charity in Dublin incorporated by Act of Parliament, and having a common seal, possessed stock in the public funds, which stock was in Ireland registered in the Bank of Ireland. G., the secretary of the incorporated trustees, was allowed to have the seal in his possession. Five several powers of attorney prepared in different years, sealed with the seal of the incorporated trustees, the due affixing of which seal was attested by witnesses, who (though without any fraudulent intention) attested what was not true, since the seal was affixed by the unauthorised act of the secretary alone, were presented to the Bank, and the stock was transferred. The facts were afterwards discovered, and G., the secretary, was indicted and convicted. By a power of attorney duly executed, the trustees then authorised C. to transfer the stock, * 985 but the Bank refused to make the transfer. An action was *brought by the trustees on this refusal; the Judge who tried the cause told the jury that if under these circumstances the trustees had so negligently conducted themselves, as to contribute to the loss, the verdict must be given for the Bank. On exceptions for this direction: — *Held*, that it was wrong. — *Bank of Ireland v. Trustees of Evans's Charities*, 389.

BANKRUPTCY.

1. A deed of arrangement, though executed by six sevenths in number and value of the creditors of an insolvent estate, will not be binding on the rest, if executed so as to be capable of being carried into effect before the passing of the Act 12 & 13 Vict. c. 106. — *Larpent v. Bibby*, 481; *Noble v. Gadban*, 504.
2. *Quære.* Whether such a deed to be within the statute must provide for the complete distribution of the insolvent's estate and effects without any reservation whatever? It seems that it is void, if it only provides for such distribution among those creditors who are parties to it. — *Id.*
3. *Quære.* As to the effect of the word *now* in the 224th section of the statute? — *Id.*

BILL OF EXCEPTIONS. See ERROR, MISDIRECTION, PRACTICE.

BILLS OF EXCHANGE. See USURY.

"CAPITAL PROPERTY." See WILL, 4.

"CARBURET OF MANGANESE." See PATENT.

CHARGES. See MORTGAGE, 2. TRUSTS, 1. USURY, 4. WILL, 2.

CHARITY. See COSTS, INFORMATION, MISDIRECTION, PRACTICE, WORDS.

MEANING OF.

CLIENT. See SOLICITOR AND CLIENT.

COMMITTEE OF LUNATIC. See EVIDENCE.

COMPANY. See CONTRACT, DIRECTORS, FOREIGN COURT.

1. Where an Act creating a railway company, or giving new powers to an existing company, authorises the purchase of lands for extraordinary purposes, a person who agrees to sell his land to the company is not bound to see that it is strictly required for such purposes: if he does not know of any intention to misapply the funds of the company, but acts *bonâ fide* in the matter, he may enforce performance of the contract. — *Eastern Counties Railway Company v. Hawkes*, 331.
2. Promoters of a company proposing to make a line of railway, or persons standing in a similar situation, as directors of an existing company applying to Parliament for authority to make a new line, may lawfully enter into a contract for land that will be necessary for the proposed line should the bill * pass, and when it has passed, such contract will * 986 be valid, and may be enforced. The mere want of legal power to make the contract at the moment of entering into it will not affect its validity afterwards. — *Id.*
4. *Secus*, where the Act is itself illegal, and Parliament is to be asked to legalize it. — *Id.*
5. Where a contract for the purchase of land is made by the projectors of a proposed line of railway, though an action at law may be maintained upon the contract, a Court of equity will not, simply on that account, refuse its interference to compel specific performance. — *Id.*
6. Where the projectors of a railway company, in order to induce a landowner to withdraw his opposition to their bill, enter into a contract with him, in which the stipulation is that the contract is to be performed by the company after the company shall have obtained an Act of incorporation from Parliament, such contract to be valid ought to be one which might be lawfully made by the company after incorporation. — *Preston v. Liverpool, &c. Railway*, 605.
7. It is *ultra vires* of a corporation established for the purpose of making a railway, to enter into a covenant to pay a large sum of money to a man for not opposing the passing of the company's bill in Parliament. — *Id.*
8. C. P. was a landowner, a railway company was projected, and for the intended railway some of his land would be required. He threatened to oppose the bill. The projectors entered into an agreement with him, that "in case the company shall obtain an Act of incorporation, the company shall pay to C. P. 1000*l.* for all lands required by the company for the due making of the railway, and 4000*l.* for residential injury to the estate and hall of C. P." That a tunnel should be constructed in a par-

ticular manner through a part of his property, and that a passenger station should be made, &c. C. P. withdrew his opposition, and the bill passed : the railway was not made, nor were the lands required : — *Held*, that this was not a contract which on the mere passing of the bill entitled C. P. to claim from the company payment of the money. — *Id.*

CONTRACT. See CORPORATION, EQUITY.

1. A contract between a railway company and a building contractor stipulated that payments should from time to time, during the progress of the works, be made by the company to * the contractor, such payments to be made on certificates granted by the "principal engineer of the company, or his assistant resident engineer." In case of dispute between the contractor and the assistant resident engineer the decision of "the principal engineer of the company" was to be final ; but at the completion of the works, if the contractor and the principal engineer differed, the differences between them were to be settled by arbitration. After differences had so arisen between the contractor and the company, it was discovered by the former that the principal engineer was a shareholder in the company. On a bill to have accounts taken, one of the grounds for which was this fact, then first discovered : — *Held*, that (no fraudulent concealment being alleged) it formed no ground for relief ; for that by contract the contractor had bound himself to submit to the judgment of a particular individual, whose position as principal engineer made him interested for the company. The case of *Dimes v. The Grand Junction Canal Company* (3 H. L. Cas. 759) held not to apply. — *Ranger v. The Great Western Railway Company*, 72.
2. A contractor undertook to do certain works within a given term, or to pay certain fixed sums ; whether these were penalties or unliquidated damages was not necessarily the subject of a bill in equity, but might properly have been decided in an action at law. The fact that a bond with a penalty had been given to secure the payment of them was itself strong evidence to show that they were liquidated damages. — *Id.*
3. A contractor agreed with an incorporated company to do certain works, the contract being under seal. In this contract there was a stipulation, that if the company should think proper at any time to make any addition to the original works, the company should be at liberty to do so on giving him written instructions for that purpose, signed by the principal or assistant engineer. A verbal arrangement was afterwards made by the principal engineer for the execution of certain extension works allowing for a variance in the prices, but stipulating that with the exception of that variance, all the provisions of the contract should be considered as applicable to the extension work. This work was executed by the contractor under this arrangement : — *Held* that he could not afterwards reject the terms of the contract, and claim remuneration for the work as upon a *quantum meruit*, nor could he ask in equity for accounts to be taken independently of the contract. — *Id.*
- * 988 * 4. In a contract with a railway company for the execution of certain works, there was a clause empowering the company, after notice, to take possession of the plant and to finish the work : the company acted on this

clause:— *Held* that this did not furnish ground for a bill in equity as putting an end to the contract, though it might be the subject of an action for damages. — *Id.*

5. W. M. had given a bond and warrant of attorney to secure the repayment of a sum of money. Judgment had been entered up, but not executed; the bond and warrant of attorney came into the possession of L., as personal representative of the original obligee. She was on terms of affectionate friendship with W. M., and often said that he had been unfairly treated, in being made to enter into these securities. L. had in early life received from the father of W. M. a conveyance of some property in India; the deed of conveyance was expressed to be for a money consideration of 10,000 rupees: in truth the money consideration was, if any, a debt of 1200 rupees, the rest was a purely voluntary gift, and no money whatever passed, when the conveyance was executed. W. M. was about to marry, and when his marriage was in contemplation discussions arose about the bond and warrant of attorney. W. M.'s father told L., that he was advised, if she did not abandon the claim on the bond and warrant of attorney against his son, to execute a deed which would put an end to the conveyance of this Indian property as a voluntary conveyance made without consideration. In his depositions, he said that L. promised not to enforce the bond and warrant of attorney, if he would abstain from interfering with the conveyance. Other evidence was given of declarations by her, that she "had abandoned" the claim, and of a promise, often repeated, that she would never trouble W. M. about it:— *Held*, that this promise, if it constituted a contract, was not a contract made "in consideration of marriage," so as to bring it within the words of the Statute of Frauds. — *Jorden v. Money*, 185.
6. A cargo of corn was shipped by A. at Salonica in February, 1848, for delivery in London. On the 15th of May it was sold by H. a factor, who made the sale on a *del credere* commission. The contract described the corn as "of average quality when shipped," and the sale was made at "27s. per quarter free on board, and including freight and insurance to a safe port in the United Kingdom, payment at, &c. upon handing shipping documents." In fact the corn had, a short time before the date of * 989 the contract, been sold at Tunis, in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract: In an action for the price brought against the factor:— *Held*, that the contract contemplated that there was an existing something to be sold and bought and capable of transfer, which not being the case at the time of the sale by the factor, he was not liable. — *Couturier v. Hastie*, 673.
7. Railway company A. agreed with railway company B., that in consideration of being allowed to use a part of B. line, the traffic on the part so used should be paid for according to a certain definite rate of toll which was reduced below the ordinary amount. A. was afterwards amalgamated with other lines which had been made since the agreement was entered

into, and its own amount of traffic was increased not only by those new lines, but by their bringing it into communication with some of the chief lines of the country. B. had also been amalgamated with other newly created lines. In both instances, the amalgamating acts had preserved all the "rights, powers," &c. of the original lines:—*Held*, that not only all the traffic which passed over line A. having originated there, but all that which came on line A. having originated elsewhere, might pass, on payment of the reduced rate of toll, over the part of the line B. which was the subject of the original agreement.—*Lancashire and Yorkshire Railway Company v. East Lancashire Railway Company*, 792.

8. There were however cases in which company A. might deprive itself of the benefit of this agreement, as for instance, if company A. should, in consideration of any particular benefit or service to itself, grant to any one a free passage along the whole distance (including therefore the particular part of the line B. the subject of the agreement), in which case B. might claim payment independently of the agreement.—*Id.*
9. It is a principle of law, that parties cannot by contract oust the Courts of their jurisdiction; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant.—*Scott v. Avery*, 811.
10. A. effected in a mutual insurance company a policy of insurance
* 990 on ship, one of the conditions of which was, that the sum to * be paid to any insurer for loss should in the first instance be ascertained by the committee; but if a difference should arise between the insurer and the committee "relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance," the difference was to be referred to arbitration, in a way pointed out in the conditions: "provided always, that no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy," until the matter has been decided by the arbitrators, and "then only for such sum as the arbitrators shall award," and the obtaining the decision of the arbitrators was declared a condition precedent to the maintaining of an action:—*Held*, that these conditions were lawful, and that (even should the difference relate to other matters than those of mere amount) till award made no action was maintainable.—*Id.*

COPYHOLD. See WILL.

CORPORATION. See CHARITY, DOMICILE, 3. SURETY.

1. A corporation of itself cannot be guilty of fraud, but where it can only accomplish the object for which it was formed, through the agency of individuals, who act fraudulently, the corporation stands in the same situation with respect to the conduct of its agents as a private person would have stood had his agent so misconducted himself.—*Ranger v. The Great Western Railway Company*, 72.
2. By the 6 & 7 Wm. 4, c. 100 (passed in August, 1836), no conveyance of lands in certain corporations (of which Drogheda was one), was to be made, unless in pursuance of a covenant, contract, or agreement made, or a resolution of the corporation duly entered in the corporate books, before

the 16th February, 1836. This provision was continued by successive statutes, and incorporated into the 3 & 4 Vict. c. 108, and c. 109. The corporation of Drogheda had from time to time passed resolutions as to the granting of leases of the corporate property, and on the 20th April, 1801, passed a resolution (which was duly entered in the corporate books), directing that "the auditors and viewers should on reporting on petitions for the renewals of leases take into consideration the value of the premises, and value the same at the full value between man and man, and that the petitioner so applying shall be then entitled to a renewal," on certain terms therein mentioned, "and that all reports shall hereafter be received at one assembly, and taken into consideration not sooner * than * 991 the then following quarter assembly." A lease had been granted in 1785 for sixty-one years; in 1841 a petition was presented for its renewal; the petition was referred to the auditors and viewers, whose report was presented on the 7th January, 1842, and on the same day a resolution ordering the renewal was passed: — *Held*, that this was not a resolution which brought the case within the exceptions in the statute; for it merely bound the corporation to receive the report, and afterwards to consider the propriety of acting upon it. The resolution need not be a contract. — *Drogheda, Mayor, &c. v. Holmes*, 460.

Per LORD ST. LEONARDS: This resolution was insufficient, although it might not be necessary that the resolution should be such as would form a binding contract, enforceable in a Court of equity; and further, the resolution, such as it was, had not been complied with, for the lease was granted at the same meeting at which the report of the auditors and viewers was presented. — *Id.*

COSTS. See HUSBAND AND WIFE, PRACTICE.

1. In an information against the donees of a fund on which there was a charge for the benefit of a charity, the prayer of the information was granted, and inquiries were directed. This House reversed the decree of the Court below, and ordered the information to be dismissed, but only with costs up to the hearing, upon the ground that the Court below having directed the inquiries, the relator was entitled to proceed upon that direction. — *Mayor, &c. of Southampton v. The Attorney-General*, 1.
2. One part of a decree was held to be sufficiently doubtful to justify an appeal against it; but as to another part of the same decree, the appellant having sought to obtain a construction of articles of agreement, which he knew not to be justified by circumstances, the appeal, being dismissed, was dismissed with costs. — *Wilson v. Wilson*, 40.
3. As part of the decree of the Court below was sustained, and part was reversed, no costs were given. — *Torre v. Browne*, 555.
4. The decree of the Court below was varied, but only as to a small extent, not the material subject of the appeal: — *Held*, therefore, that the appellant must pay the costs of the appeal. — *Savery v. King*, 627.
5. Costs of a preliminary objection to the course of proceeding reserved till the hearing of the cause itself. — *McMahon v. Leonard*, 931.

* COURT. See ADMIRALTY, EQUITY, FOREIGN COURT.

* 992

"COVENANT." See CORPORATION, 2.

CREDITOR. See TRUST, 1. USURY, 4.

CUSTOMARY HEIRS. See WILL, 2.

DEBTS. See LIMITATIONS, STATUTE OF. MORTGAGE. TRUST.

DEBTS, CHARGE OF. See PURCHASER, 2. TRUSTS, 1.

DEED OF SEPARATION. See HUSBAND AND WIFE.

DEVISEE.

Where there is a general charge of debts, but no legal estate is given, the executors may have implied authority to convey the legal estate in order to raise the money to satisfy the charge; but where there is a devise of the legal estate to a particular person, and the estate is charged with payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title. — *Colyer v. Finch*, 905.

DIRECTORS. See COMPANY.

1. A banking company was established under the 7 Geo. 4, c. 46. By the deed of settlement of the company, it was declared that no transfer of shares should be permitted, except upon notice to the directors, and on the consent thereto of a board of directors, such consent to be signified by a certificate in writing signed by three directors at the least. If such consent was refused, the shareholder might require the directors to buy his shares at the market price of the day. After a consent given, the name of the transferee was entered in the share register book, and the entry there was conclusive against him. No shareholder could compel an inspection of the books of the company. S. was a shareholder; he desired to transfer his shares to different individuals, and he sent the proper notices to the directors; he received back consents signed by three directors, on which he completed the transfers; the transferees' names were entered in the share register book; and the returns made to the Stamp Office under the 7 Geo. 4, c. 46, omitted the name of S. from the list of shareholders, and inserted it in the list of those who had ceased to be shareholders. The transferees afterwards received the regular notices of meetings, &c. The directors subsequently sought to impeach these transfers, on the ground that the notices had never been submitted to a "board of directors," nor the consents given by such "board," * but that the consents had merely been examined by the managing director alone, then signed by him, and afterwards signed by two other directors. It appeared that this mode of transacting the business of the company had existed ever since the formation of the company: — *Held*, affirming a judgment of the Master of the Rolls, that such being the case, the directors could not in this instance set up their own want of observance of the formalities required by the deed as a ground on which to fix S. with liability as a continuing shareholder; their course of dealing bound them, and he was released. — *Bargate v. Shortridge*, 297.
2. A creditor of the company had sued the company and obtained judgment, and then, at the desire of the directors, had issued a *sci. fa.* against S.; S. obtained an injunction to prevent the creditor from enforcing the judgment as against S. — *Id.*
3. Per LORD ST. LEONARDS: Where a company has, under the Act 7 Geo.

- 4, c. 46, made use of a creditor to proceed against a person, as a shareholder, when that person ought not properly to be placed in that position, he is entitled to relief. — *Id.*
4. If directors of a company do acts in a matter in which they have no authority, those acts are null and void; but if they neglect the acts which are within their authority, and which they ought to perform, neither a Court of law nor of equity will allow them afterwards to take advantage of their own neglect. — *Id.*
5. In a contract for the sale of land for the purposes of a projected railway the vendor was described as having, so far as regarded one part of the land, no more than a mere life estate, and the projectors of the railway undertook to obtain from Parliament powers to enable him to make a good title: — *Held*, that where they did not fulfil this stipulation, or but for their own default the title might have been perfected, they could not set up his deficiency of title as an answer to a bill for specific performance. — *Eastern Counties Railway Company v. Hawkes*, 331.
6. But (per Lord Campbell) though an individual vendee may consent to accept a defective title, it is doubtful whether the directors of a railway company, acting on behalf of the proprietors, can do so. — *Id.*
7. *Seem*, that where the directors of a railway company, wanting part of a property, purchase more of it than is required, * though * 994 that may become a question between them and the shareholders, they cannot on that account avoid the contract with the seller. — *Id.*

DOMICILE. See FOREIGN COURT.

1. A company may have two domiciles, and places of business may for the purpose of founding jurisdiction be treated as places of domicile, and service there is sufficient. — *Carron Company v. Maclaren*, 416.
2. *Quære*. Whether service of notice of injunction on an agent, when the principal is out of the jurisdiction, can be good service, especially when that agent is merely an agent for the sale of the goods of the principal? — *Id.*
3. Service of notice on one member of a corporation is sufficient. — *Id.*

DUBLIN. See CORPORATION.

EQUITY. See CORPORATION. HUSBAND AND WIFE.

1. In a contract with a railway company for the execution of certain works, there was a clause empowering the company, after notice, to take possession of the plant and to finish the work: the company acted on this clause: — *Held*, that this did not furnish ground for a bill in equity as putting an end to the contract, though it might be the subject of an action for damages. — *Ranger v. The Great Western Railway Company*, 72.
2. Where a person possesses a legal right, a Court of equity will not interfere to restrain him from enforcing it, because, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will equity interfere even though the parties to whom these representations were made have acted on them, and have, in full belief in them, entered into irrevocable en-

gements. To raise such an equity, there must be a misrepresentation of facts, and not of mere intention (Lord St. Leonards *dissentiente*). — *Jorden v. Money*, 185.

3. Per LORD ST. LEONARDS: "It is immaterial whether there is a misrepresentation of a fact as it actually existed, or a misrepresentation of an intention to do or abstain from doing an act which would lead to the damage of the party whom you thereby induced to deal in marriage, or in purchase, or in any thing of that sort, on the faith of that representation." — *Id.*
- * 995 * 4. Where one person intrusted with sums of money to invest for the benefit of another has signed an agreement admitting an amount due, equity will compel their transfer. — *Stanton v. Percival*, 257.
5. A creditor of a company had sued the company and obtained judgment, and then, at the desire of the directors, had issued a *sci. fa.* against S.; S. obtained an injunction to prevent the creditor from enforcing the judgment as against S. — *Bargate v. Shortridge*, 297.
6. Per LORD ST. LEONARDS: Where a company has, under the Act 7 Geo. 4, c. 46, made use of a creditor to proceed against a person, as a shareholder, when that person ought not properly to be placed in that position, he is entitled to relief. — *Id.*
7. If directors of a company do acts in a matter in which they have no authority, those acts are null and void; but if they neglect the acts which are within their authority, and which they ought to perform, neither a Court of law nor of equity will allow them afterwards to take advantage of their own neglect. — *Id.*
8. Where A. and B. join in a transaction effected with them by C. which is invalid as to B., he is not precluded from afterwards objecting to it merely because it is binding on A. — *Savery v. King*, 627.
9. A Court of equity does not restrict the protection it will afford a purchaser for valuable consideration without notice, to a case in which he has got the legal estate. — *Colyer v. Finch*, 905.

EQUIVALENT, CHEMICAL. See PATENT.

ERROR. See PLEADING.

The Court in which an action was brought gave a final judgment, a Court of error reversed or varied that judgment, though the form in which this was done in the Court of error was not that of a final judgment: — *Held*, that error would lie to this House. — *M'Makon v. Leonard*, 931.

EVIDENCE.

1. The evidence of a single witness cannot be received against the answer of a defendant, unless there are circumstances which go to corroborate the witness as against the answer. — *Jorden v. Money*, 185.
2. A., B., and C. were committees of a lunatic. To a bill filed against the lunatic and themselves, as committees, they put in an answer stating certain facts. That cause went to issue, and witnesses were examined.
- * 996 The lunatic died; A. and the * wives of B. & C., who were relatives, obtained letters of administration to her estate as her next of kin. The plaintiff in the original suit then filed a bill of revivor against A., the two wives, and their husbands, merely praying for a revival of the suit. The

ordinary order was made. The defendants to the bill of revivor put in an answer, in which they craved to have the full benefit of the answer to the original bill; there was no replication to this answer. The original answer contained statements which at the hearing were admitted to be read against the defendants:—*Held*, that under the circumstances of this case these statements were properly admitted in evidence. — *Stanton v. Percival*, 257.

3. Where there is no replication to the answer to a bill of revivor, is a plaintiff bound, if he relies on the original answer, to take it as absolutely true in all particulars? — *Id.*
5. Is an answer by committees binding upon the estate of the lunatic? It is binding on them in any other character. — *Id.*

EXCEPTIONS. See ERROR, MISDIRECTION, PRACTICE.

EXISTENCE OF THING SOLD. See CONTRACT.

FATHER AND SON. See SOLICITOR AND CLIENT.

FOREIGN COURT.

1. If the circumstances of a case are such as would make it the duty of one Court in this country to restrain a party from instituting proceedings in another Court here, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign Court. — *Carron Company v. Maclaren*, 416.
2. The fact of a foreigner having property in this country, enables the Court here to make effectual an injunction issued to him; but, especially in the case of a foreigner who seeks no assistance from the Courts here, the issuing of such injunction ought clearly to be shown to be required as conducive to justice. — *Id.*
3. Where there is a plain equity in favour of an injunction, at the suit of representatives of the real and personal property, who are in this country, the Court will grant it, and restrain proceedings in the Courts of a foreign country. In such a case the Court will decide upon a consideration of all the circumstances, and require parties here to take or omit such steps in a foreign Court as the ends of justice may require. The particular provisions of the foreign law applicable to a transaction, proceedings as to which in a foreign Court are thus restrained, must not be disregarded. — *Id.*
- * 4. A company was chartered in Scotland for the manufacture of iron. * 997 Its manufactory and chief office of management were there; it had agents for the sale of the goods in different parts of Scotland and England, and it possessed real estate in both countries. A. (who was likewise a large shareholder in the company, and was possessed of real and personal property in England and Scotland) was the company's agent for the sale of goods in London. When he died, he made a will in the English form, and appointed as his executors persons who were resident in both countries; his heir was one of these persons, and was also the person who succeeded him in the London agency for the company. Probate of the will was taken out in England, and such of the executors as thought fit to apply to the Scotch Court were, according to the Scotch law, confirmed in the execution of the will. An administration suit was instituted in the Court of

Chancery, and the usual order for a general account of the debts and assets made. After the date of this order the iron company took proceedings in the Scotch Courts against the real and personal estate of the testator in Scotland. Notice of an injunction at the suit of the executors was served on the company's agent in London, and on the company's manager in Scotland; the company did not appear, and the injunction was issued. The company then moved to dissolve the injunction. No order was made:—*Held* (Lord St. Leonards *dissentiente*), that the injunction could not be maintained. — *Carron Company v. Maclaren*, 416.

FRAUD. See CONTRACT, CORPORATION, TRUST.

FREIGHT. See ADMIRALTY.

HEIR MALE. See WILL.

HUSBAND AND WIFE.

1. A suit for nullity of marriage had been instituted by the wife against her husband; an arrangement for a deed of separation was proposed in order to stop it. An agreement was entered into by which the property of the parties was regulated, and by which their conduct in relation to each other was to be guided. One of the articles of this agreement stipulated that the husband should "permit the wife to live separate and apart from him, as if she were unmarried, without any molestation, interference, or annoyance whatsoever by, or on the part of," the husband. By another article, it was declared that if he performed the covenants, &c., "he, his heirs, executors, &c., and their estates and effects, shall be indemnified
- * 998 * from all the present debts and liabilities of the said John" (the husband), "by the joint and several covenant of" the trustees for the wife. A deed was to be drawn up in conformity with these articles, and on mutual execution of the deed the suit for nullity was to be withdrawn. On a bill by the wife to compel the husband specifically to perform this agreement, the Vice-Chancellor made an order referring it to the Master to approve of a proper deed to carry its provisions into effect. This order was confirmed on appeal to this House. Pending the appeal, the Master approved of a deed containing a covenant by the husband not to institute any suit in the Ecclesiastical Court for restitution of conjugal rights, and another in which the trustees of the wife agreed to indemnify the husband "against the present and future debts of Mary" the wife. Exceptions to this deed taken by the husband were overruled by the Vice-Chancellor, whose decision was affirmed by the Lord Chancellor: — *Held* that, after a previous judgment of this House affirming the order which referred the agreement to the Master as the basis for a deed of separation between these parties, the subsequent order approving of the deed as drawn by the Master must be supported. — *Wilson v. Wilson*, 40.
2. But *quare*, Whether as a rule of equity the Court could enforce by injunction a stipulation to live separate, or not to bring a suit for restitution of conjugal rights, though undoubtedly it could enforce stipulations as to an arrangement of property, and as to forbearance from personal molestation? — *Id.*
 3. *Held*, also, that the Court was fully at liberty to examine the articles of agreement, and on finding in them a stipulation as to payment of debts,

inconsistent with the rest of the articles, and insensible or absurd, to authorise the introduction into the deed of a covenant which would carry into effect the real intentions of the parties. — *Id.*

4. A husband cannot assign his wife's reversionary interest in leaseholds, if that interest was of such a nature that it could not possibly vest in the wife in possession during the coverture. Judgment of the Court below affirmed without argument. — *Day v. Duberley*, 388.

IMPLIED TRUST. See **TRUST.**

INFORMATION.

1. If a charity is entitled to a particular sum as a first charge on an estate given to certain persons, and the estate is amply sufficient to secure payment of that sum, the fact that a * portion of the estate has been * 999 lost by the alleged negligence of the donees of the estate, will not of itself justify an information on behalf of the charity against such donees. — *Mayor, &c. of Southmolton v. The Attorney-General*, 1.
2. Where a portion of an estate held under such circumstances was charged to have been improperly sold, the purchasers must be included as parties in any such information. — *Id.*
3. Where such portion consisted of land held upon a renewable lease, and the lessors were entitled to refuse a renewal, and the bargain was in fact made with them before the period for renewal arrived, such bargain, made under such circumstances, does not afford matter of complaint against the donees of the estate. — *Id.*

INHERITOR. See **WILL**, 4.

INJUNCTION. See **HUSBAND AND WIFE.**

INTEREST. See **WILL**, 3.

INVESTMENT OF MONEY. See **TRUST.**

IRISH PEERS. See **PEERAGE.**

JUDGES.

Not to be consulted on a claim to sit and vote in the House of Peers. — *Wensleydale Peerage*, 958.

JURISDICTION. See **ADMIRALTY**, **CONTRACT**, **FOREIGN COURT.**

LANDS. See **COMPANY**, **DIRECTORS**, **USURY.**

LEASE. See **CORPORATION.**

LEGACIES, CHARGE OF. See **PRIORITY.**

LIFE PEERAGES. See **PEERAGE.**

LIMITATIONS, STATUTE OF.

A., who had a life interest in certain estates, gave a bond to a creditor, and a warrant of attorney to confess judgment for its amount. No judgment was entered up. A. died within three years of the date of the bond, leaving no assets, real or personal. B., his son, the first tenant in tail of the estates, entered into possession, and expressed in letters to the creditor a wish to pay his father's debts, but would not give any security for them. B. made a will, in which, reciting his own wish, and a promise in conformity with it, made by him to his father and mother, he said: "And in case I should not be able to fulfil my intentions during my lifetime, and that I should not have a sufficient fund for that purpose arising from my personal estate, I hereby charge all my just debts, and also all the debts

of my late father, A., which shall remain unpaid at the time of my decease, upon all my real estates wheresoever," &c. He then directed his trustees to stand seised of all his estates "subject in manner aforesaid *1000 to the *payment of all my just debts and to the debts of my father." B. survived his father many years. The obligee of the bond filed a charge thereof against the trustees under the son's will: — *Held*, that the debts of the father, which were not barred by the Statute of Limitations at the death of the father, were charges on the real estates of the son. — *O'Connor v. Haslam*, 170.

LIQUIDATED DAMAGES. See **CONTRACT**, 2.

"MALE LINE." **"FEMALE LINE."** See **WILL**, 4.

"MANGANESE, CARBURET OF." See **PATENT**.

MARRIAGE. See **CONTRACT**, 5. **EQUITY**.

MISDIRECTION. See **PRACTICE**, 3.

1. Trustees of a charity in Dublin incorporated by Act of Parliament, and having a common seal, possessed stock in the public funds, which stock was in Ireland registered in the Bank of Ireland. G., the secretary of the incorporated trustees, was allowed to have the seal in his possession. Five several powers of attorney prepared in different years, sealed with the seal of the incorporated trustees, the due affixing of which seal was attested by witnesses, who (though without any fraudulent intention) attested what was not true, since the seal was affixed by the unauthorised act of the secretary alone, were presented to the Bank, and the stock was transferred. The facts were afterwards discovered, and G., the secretary, was indicted and convicted. By a power of attorney duly executed, the trustees then authorised C. to transfer the stock, but the Bank refused to make the transfer. An action was brought by the trustees on this refusal; the Judge who tried the cause told the jury that if under these circumstances, the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be given for the Bank. On exceptions for this direction: — *Held*, that it was wrong. — *Bank of Ireland v. Evans's Trustees*, 389.
2. In an action for an alleged infringement of a patent where the defence is that the supposed invention is not new, the Judge may compare the plaintiff's specification with the specification of a previous patent, and may on such comparison direct the jury to find a verdict. — *Bush v. Fox*, 707.
3. B. took out a patent, which he described as relating to "means and apparatus for working under water in order to produce excavations and building foundations of lighthouses, piers, jetties, and other structures under water." There had been a previous patent taken out by another *1001 person, for "An apparatus *to facilitate excavating, sinking, and mining." On comparing the two patents, the Judge at the trial was of opinion that both claimed substantially the same invention. The evidence showed some difference in the mode of working, but the witnesses said that both patents had substantially the same object. The Judge thereon directed a verdict to be found for the defendant: — *Held*, that the direction was right. — *Id.*

MORTGAGE.

1. A first mortgagee having the legal title is not to be postponed to a second,

merely because he has not possessed himself of the title deeds of the estate; he can only be postponed where he has been guilty of fraud or gross negligence. — *Colyer v. Finch*, 905.

2. If an estate is given to a devisee charged with the payment of legacies, and he mortgages the estate to one person and afterwards sells it to another, the purchaser will stand in the place of the legatees, but will do so bound in equity to make good the mortgage debt. — *Id.*

NAME. See WILL, 4.

NEGLIGENCE. See MISDIRECTION, TRUSTEES.

NOTICE. See DOMICILE, PRACTICE.

"OVERPLUS." See WORDS, MEANING OF.

PATENT. See MISDIRECTION.

1. Where a patent has been obtained for the use of a known substance, described by its specific name, and it is afterwards discovered that the use of two other and equally known substances will produce the same effect, though the evidence of scientific men may go to show that the two substances become, in the act of so using them, the one substance described in the patent, their use will not constitute an infringement of the patent. — *Unwin v. Heath*, 505.
2. A. obtained a patent for an improved mode of manufacturing cast steel by the use of "carburet of manganese." This substance was well known, but was very expensive. At the time the patent was taken out, it was known that carburet of manganese might be obtained from the combination of two inexpensive articles, oxide of manganese and coal tar. Some little time after the patent had been in existence, it was found that if oxide of manganese and coal tar were put into the melting pot with the metal, cast steel would be produced equal to that which was produced by the aid of the "carburet of *manganese." Some of the *1002 witnesses said that the carburet was produced in the melting pot at the instant of the fusion of all the ingredients therein contained: — *Held*, that the use of these two articles in that manner was not an infringement of the patent. — *Id.*

PEERAGE.

1. The word "peerage," in the fifth clause of the fourth article in the Act of Union of Great Britain and Ireland, means the status and condition of a peer, and therefore where one person held many titles, by any one of which he could sit in the Irish House of Peers, so long as any one of those titles remained in him or his descendants the loss of any of the others did not constitute an extinction of a peerage. — *Fermoy Peerage*, 716.
2. A. before the Union with Ireland, was a peer of Ireland, by the title of Earl M. That title had descended to him from an ancestor, to whom it was granted with the usual limitation to the heirs male of his body. Before the Union took effect, A. received a new patent, creating him Baron of M., remainder to the heirs male of his body, failing whom to B. and the heirs male of his body: A. died without leaving male heirs of his body, and the Earldom of M. was left without a successor, and the Barony of M. passed to B.: — *Held*, that this was not such an extinction of a peerage as was contemplated by the Act of Union, and consequently could not

be taken as one of three extin
Crown could create a new Irish

3. *Quære*. Whether when the val
questioned the Attorney-Gener
4. Letters patent were granted
to create him a baron of the l
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be taken as one of three extinctions, on the happening of which, the Crown could create a new Irish peerage. — *Id.*

3. *Quære.* Whether when the validity of an existing grant of a peerage is questioned the Attorney-General is bound to appear to support it. — *Id.*
4. Letters patent were granted by the Crown to a commoner, purporting to create him a baron of the United Kingdom for life, with a seat in Parliament: the letters patent were followed by a writ of summons to Parliament in the usual form. The House referred it to a Committee for Privileges to examine and consider the letters patent and to report their opinion thereon to the House. This reference was made without any previous reference of the matter by the Crown to the House. The committee reported "that neither the said letters patent nor the said letters patent with the usual writ of summons issued in pursuance thereof, can entitle the grantee therein named to sit and vote in Parliament." — *Wensleydale Peerage*, 958.

The House affirmed the resolution.

- * 1003 * 5. The committee declined to put a question to the Judges on this matter, which did not involve the validity of the patent for all purposes, but only the right under it to sit and vote in this House. — *Id.*

PENALTY. See CONTRACT, 2.

PERFORMANCE, SPECIFIC. See COMPANY, CONTRACT, DIRECTORS.

PLEADING. See ADMIRALTY.

1. Is a replication necessary to an answer to a mere bill of revivor? — *Stanton v. Percival*, 257.
2. Circumstances under which a supplemental bill is properly filed. — *Persse v. Persse*, 682.
3. Circumstances under which, with relation to an original settlement, a second wife and the children of both marriages may properly be made parties to such bill. — *Id.*
4. A judgment of the Court of Common Pleas in Ireland had overruled a bill of exceptions. On error to the Exchequer Chamber there, the judgment of that Court was, that some of the exceptions be allowed and some disallowed, and that the judgment be reversed, annulled, and held for naught. On error brought to this House, after the 16 & 17 Vict. c. 113 (Ir.): — *Held*, that the defendants in error might join in error in the usual form, without thereby admitting that any of the exceptions had been properly overruled, the judgment of the Court of Exchequer being restricted to reversing, &c. that of the Common Pleas, and awarding a *venire de novo*. — *M'Mahon v. Leonard*, 931.

PRACTICE. See COSTS, DOMICILE, EVIDENCE, FOREIGN COURT, PLEADING, SOLICITOR AND CLIENT.

1. A decision of this House when once pronounced in a particular case is conclusive in that case, and cannot be reversed except by Act of Parliament; but if the House should afterwards be of opinion that an erroneous principle had been adopted in the first case, the House would not be bound in any other to adhere to such principle. — *Wilson v. Wilson*, 40.
2. One part of a decree was held to be sufficiently doubtful to justify an appeal against it; but as to another part of the same decree, the ap-

pellant having sought to obtain a construction of articles of agreement, which he knew not to be justified by circumstances, the appeal, being dismissed, was dismissed with costs. — *Id.*

3. * On the trial in Dublin, of an action between A. and B., the Judge * 1004 gave certain directions to the jury, to which A. objected; he tendered a bill of exceptions, which (according to the provisions of the Irish Statute 28 Geo. 3, c. 81) was duly signed by the Judge, and was afterwards argued in the Court in which the action was brought. That Court adopted the exceptions and ordered a *venire de novo*, and a new trial took place, the Court deciding that such was the proper course. B. did not appear at the second trial. On the first trial, the verdict had been given for B.; on the second it was given for A., and judgment was pronounced thereon in his favour; B. brought a writ of error, and then, finding that the *postea* and all the proceedings relating to the first trial had been struck out of the record, which from the first *venire* went on with formal continuances only to the second trial and verdict, he applied to the Court in which the action was brought, to have these omissions supplied. That Court refused to supply them: — *Held*, that this mode of proceeding was erroneous, and this House ordered the Court in which the action was brought to amend the record, by entering on the plea roll the first trial, the exceptions, and the award of a *venire de novo*. — *Bank of Ireland v. Evans's Trustees*, 389.
4. *Held* also that B. was not bound to appear at the second trial. — *Id.*
5. *Quære*. Whether service of notice of injunction on an agent, when the principal is out of the jurisdiction, can be good service, especially when that agent is merely an agent for the sale of the goods of the principal. — *Carron Company v. Maclaren*, 416.
6. Service of notice on one member of a corporation is sufficient. — *Id.*
7. A suit to administer a will was instituted in 1800; a great many delays had taken place; it is a rule of equity to give interest, where there has been unnecessary and vexatious delay; but as the House could not attribute the delays in this case to any particular party in the suit, no interest was allowed. — *Torre v. Browne*, 555.
8. A party is not prevented from appealing against a decree, because he did not except to the Master's report on which it is founded. — *Id.*
9. Where a part of a decree was sustained and part reversed, no costs were given. — *Id.*
- * 10. The House does not reform a decree of the Court below. — * 1005 *Lane v. Horlock*, 580.
11. Though an appellant comes to London long before it is necessary to do so in order to attend the hearing of his cause, so that if then arrested he would not be discharged, yet if no arrest is made until his cause is actually in the paper, he will be discharged out of custody. — *Persse v Persse*, 671.

PREFERENCE OF MALE LINE TO FEMALE LINE. See WILL.

PRINCIPAL AND SURETY. See SURETY.

PRIORITY. See DEVISEE, PURCHASER.

PROJECTORS. See COMPANY, DIRECTORS.

PROMOTERS. See COMPANY.

PURCHASER. See COMPANY, SOLICITOR AND CLIENT.

1. A Court of equity does not restrict the protection it will afford a purchaser for valuable consideration without notice, to a case in which he has got the legal estate. — *Colyer v. Finch*, 905.
2. *Semble*, that where a devisee of a real estate charged with payment of debts sells the real estate, the purchaser is not bound to inquire (unless special circumstances call for such an inquiry) whether the money is applied in the payment of debts, or whether the sale was intended for that purpose. — *Id.*

RAILWAY. See COMPANY, CONTRACT, DIRECTORS.

RATIFICATION. See SOLICITOR AND CLIENT.

There can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept by the conduct of the party in whose favour it is made, unaware of the invalidity of the first transaction, and has not, at the time of the supposed ratification, the means of forming an independent judgment. — *Savery v. King*, 627.

REAL ESTATE. See WILL, 2.

REFERENCE. See CONTRACT.

REPRESENTATIONS. See EQUITY.

"RESIDUE." See WORDS, MEANING OF.

"RESOLUTION." See CORPORATION.

REVERSIONARY INTEREST IN LEASEHOLDS. See HUSBAND AND WIFE.

SALE. See CONTRACT, SOLICITOR AND CLIENT.

SCI. FA. See DIRECTORS, EQUITY.

* 1006 *SEPARATION, DEED OF. See HUSBAND AND WIFE.

SETTLEMENT, VOLUNTARY. See SOLICITOR AND CLIENT, 4.
TRUST, 1, 3.

SHARES. See DIRECTORS, EQUITY.

SOLICITOR AND CLIENT. See PRACTICE.

1. Where A. and B. join in a transaction effected with them by C., which is invalid as to B., he is not precluded from afterwards objecting to it merely because it is binding on A. — *Savery v. King*, 627.
2. When a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, equity will require the father to be able to show that the son was really a free agent, and had adequate and independent advice. — *Id.*
3. When a solicitor purchases or obtains a benefit from a client, he must show that he has taken no advantage of his professional position, but has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger. — *Id.*
4. There can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept by the conduct of the party in whose favour it is made, unaware of the invalidity of the first transaction, and has not, at the time of the supposed ratification, the means of forming an independent judgment. — *Id.*
5. J. had a life estate in certain land in Devonshire, with remainder to his

sons in tail male; R. was his eldest son, S. was J.'s solicitor, to whom J. was indebted in a sum of above 9000*l*. On this sum, J. was paying five per cent. interest, and the debt was (within 950*l*.), secured by eleven policies of assurance on J.'s life, the premiums of which, as well as the principal money, were charged on his life estate. In March, 1835, it was arranged between J. and S., an arrangement to which R. (who had then only just come of age, and who was living in his father's house), assented, that a disentailing deed should be executed, and that J. and R. should then execute a mortgage to S. for 10,000*l*., with a power of sale, the difference in the amounts being made up by a further advance, the interest being reduced to four per cent., and the policies of assurance assigned to R. for his use; all this was done. In this transaction, R. had no other professional advice than that * of S., who was *1007 his father's solicitor, and was also the mortgagee: — *Held*, that as to R., this mortgage was invalid. — *Id*.

6. J. afterwards borrowed more money from S., repayment of which was secured by charges on the Devonshire estate, executed by both J. and R., and with some of this money property was bought in Hampshire, which was conveyed to R. The encumbrances on the Devonshire estate being thus largely increased, it was afterwards put up to sale (in order to discharge all encumbrances), but was bought in, and was ultimately purchased by S. for a sum of 23,800*l*., of which 3000*l*. were paid to R. for his use, and a small balance paid to J. In these various transactions, R. had no professional advice but that of S.: — *Held*, that this sale was invalid so far as R. was concerned, and accounts were directed. — *Id*.
7. The bill to set aside these transactions was not filed till 1847: — *Held*, that under the circumstances of this case, the delay was no answer to R.'s title to relief. — *Id*.
8. The decree of the Court below was varied, but only as to a small extent, not the material subject of the appeal: — *Held*, therefore, that the appellant must pay the costs of the appeal. — *Id*.

SON. See SOLICITOR AND CLIENT.

SPECIFIC PERFORMANCE. See AGREEMENT, COMPANY, DIRECTORS, EQUITY, HUSBAND AND WIFE, TRUST.

STATUTES.

- 23 & 24 Geo. 3, c. 39 (Ir.). 938.
- 28 Geo. 3, c. 31 (Ir.). 889, 931.
- 3 & 4 Wm. 4, c. 98. 580.
- 5 & 6 Wm. 4, c. 76. 856.
- 6 & 7 Wm. 4, c. 100 (Ir.). 460.
- 1 & 2 Vict. c. 110. 580.
- 2 & 3 Vict. c. 37. 580.
- 3 & 4 Vict. c. 108 (Ir.). 460.
- 3 & 4 Vict. c. 109 (Ir.). 460.
- 6 & 7 Vict. c. 89. 856.
- 12 & 13 Vict. c. 106. 481, 504.
- 16 & 17 Vict. c. 113 (Ir.). 931.
- 19 & 20 Vict. c. 102 (Ir.). 937.

SURETY.

1. The 5 & 6 Wm. 4, c. 76, § 58, required that the council of a borough should annually elect the treasurer of the borough. While that
- * 1008 act was in force, D. M. was elected treasurer of * the borough of Berwick for "the year ending 9th November, 1842, if it should so long please the said council, but not otherwise." He gave bond with sureties for the due discharge of the duties of his office. The bond recited the election, and was conditioned for the due accounting by D. M. for all such monies, &c. "as I, the said D. M., shall or may recover, or receive, in virtue of my said appointment as treasurer as aforesaid, during the whole time of my continuing in the said office in consequence of the said election, or under any annual or other future election of the said council, to the said office. After this bond had been given, the 6 & 7 Vict. c. 89, was passed. The 6th section of that Act repealed the 58th section of the previous statute, and directed that, instead of the treasurer being annually elected, he should "hold his office during the pleasure of the council for the time being." D. M. was re-elected in November, 1843, after the passing of this latter statute: no fresh bond was taken:—*Held*, that under the original bond, the sureties continued liable; that the election in November, 1843, was "a future election," within the true intent and meaning of the bond; and that D. M. did continue in the office of treasurer within the true intent and meaning of the said bond.—*Oswald v. Berwick (Mayor)*, 856.

"SURPLUS." See WORDS, MEANING OF.

TITLE, WHO TO MAKE. See DEVISEE.

TREES. See AFFIDAVIT.

TRUSTS AND TRUSTEES. See MISDIRECTION, BILL OF EXCEPTIONS.

1. A. and B., father and son, executed in 1818 an indenture of settlement on occasion of the son's intended marriage. The father and son, the lady and her father, and other persons, trustees, were parties to the indenture. Certain freehold estates were conveyed to the trustees for A. for life, remainder to B., and these estates were exonerated from debts due by A., which debts were made charges on certain leasehold premises expressly named. These premises were vested in trustees, on trust (among other things) to keep down the interest of A.'s debts affecting any of the estates comprised in the deed, and they were empowered, "with the desire and consent" of A. and B., and notwithstanding any of the trusts therein contained, to sell the leasehold premises so put in settlement
- * 1009 for the payment of the debts and encumbrances. Another * deed was executed by A. and B. in 1824, which recited the former, appointed new trustees, added new debts, and made provision for the payment of all. The trustees never acted in discharge of the trust, and the deeds were not communicated to the creditors, but B., who by an arrangement with his father had possession and management of the estates, paid the interest on the debts. After the deaths of both A. and B., the son of the latter entered into possession of the estates. C., a bond creditor, whose name and claim were set forth in the schedule to the deed of 1818, filed a bill to have the trusts of that deed carried into execution. The

Court of Chancery in Ireland held that this debt "was within the trust contained in the indenture for the payment of the scheduled debts."

On appeal, this decision was affirmed, Lord St. Leonards *dissentiente*. — *Synnot v. Simpson*, 121.

2. Where one person intrusted with sums of money to invest for the benefit of another, has signed an agreement admitting an amount due, equity will compel their transfer. — *Stanton v. Percival*, 257.
3. R. P. being seised in tail of the estate R., executed in 1826 a settlement, by which on the marriage of his eldest son D., it was settled (subject to an annuity to himself) on D. for life, then to the first son of D. by that marriage, "and of the heirs male of such son lawfully issuing," and for want of such issue to the second, third, and fourth, &c. sons, in the same manner, and for want of such issue to the right heirs of D. In 1827, R. P. entered into an agreement with D. by which, for valuable considerations therein mentioned, he covenanted to convey to D. (subject to a life estate in himself), to the same uses as those of the R. estate, another estate called C., if (as he expected) he should become possessed of it through the death, without issue and intestate, of a lunatic brother. A commission was taken out against this brother, who was found to have been lunatic from 1823. In 1829, the lunatic died, and R. P. took possession of the estate C. In 1830, R. P. executed a deed, by which (subject to an annuity to himself) he conveyed the estate C. to H. his second son. D.'s wife died in 1829, and in 1833 D. married again, and covenanted to settle on this marriage the estate C. to the same uses as those declared of the estate R. in the first settlement. D., his second wife, and the children of both marriages, filed a bill against R. P. and H., to set aside the deed of 1830, as fraudulent, and to have a conveyance * of the estate C. executed according *1010 to the deed of 1827; and in 1840, this House on appeal made an order to that effect. In the mean time G., a natural son of the lunatic, had raised a claim, as devisee of the estate C., under a will alleged to have been made by the lunatic before 1823. R. P. died, and G. and H. entered into an arrangement by which, in consideration of G. releasing his claims under the alleged will, H. agreed to convey to G. part of the estate C., of a certain value, and to assure to him the other part to supply any possible deficiency in that supposed value. D., his wife, and all his children, filed a supplemental bill against H. and G., to have a conveyance of the estate C. executed in conformity with the order of the House: — *Held*, affirming a decree of the Court of Chancery in Ireland, that H. was in the situation of a trustee for D. of the estate C., and must execute a conveyance of it, and that he was not relieved from that liability by any purchase of the alleged rights of G. If any such rights existed, he might set them up afterwards and by a distinct process, but he could not by the use of them embarrass the trust which he had accepted on taking the conveyance from R. P. — *Persse v. Persse*, 682.
4. *Held* also, that a supplemental bill had been properly filed in this case. — *Id.*
5. *Held* also, that the second wife and the children of both marriages had been properly made parties to the supplemental bill. — *Id.*

UNION, ACT OF, WITH IRELAND. See PEERAGE.
USURY.

1. Where money is advanced at usurious interest on the security of bills of exchange, having only three months to run, such advance is protected, and the bills themselves are valid under the 3 & 4 Wm. 4, c. 98, § 7, and though a warrant of attorney to confess judgment may be taken at the same moment, on which judgment is the next day entered up and registered under 1 & 2 Vict. c. 110, so as to become a charge on the lands of the debtor, the transaction is not thereby rendered invalid under the proviso of the 1st section of the 2 & 3 Vict. c. 37. — *Lane v. Horlock*, 580.
2. The 2 & 3 Vict. c. 37, does not repeal the 3 & 4 Wm. 4, c. 98. — *Id.*
3. *Semble* that a warrant of attorney to confess judgment, though by such judgment the lands of the debtor may be charged, is not a charge upon land. — *Id.*
- *1011 *4. H. had received from L. money advanced on the security of bills of exchange. In October, 1843, he wanted a further advance, which L., after inquiring into the value of his real estate, consented to make, on condition that three months' bills should be given for the amount (usurious interest included), and that a warrant of attorney to confess judgment, which L. should be at liberty to enter up immediately, should also be executed. All this was done, and judgment was entered up on the following day, and the judgment registered. The bills given in October, 1843, were not paid when they became due in January, 1844, and others were then substituted for them. These last were also dishonoured. A sale of H.'s estate took place, under a mortgage, executed to a prior creditor, who received more than would satisfy his claim: — *Held*, that L. was entitled to maintain a bill against him to pay over so much of the surplus in his hands as would satisfy L.'s judgment. — *Lane v. Horlock*, 580.

VENDOR AND PURCHASER. See COMPANY, PURCHASER.

WARRANT OF ATTORNEY. See USURY.

WILL. See PRACTICE.

1. A testatrix, who, without professional assistance, made her own will, named Robert John M. (the eldest son of her brother) her executor. She then created two annuities, of 50*l.* each, in favour of two persons, and made a gift to a third, but in terms which left it doubtful whether the gift was of that specific sum, or of an annuity to that amount; she then proceeded thus: "My dear nephew, John Henry M. of H., surgeon, but late of Calcott Hall, the above bequests to fall into his hands, and should he not marry to be divided equally between Samuel M., John M., and Mary D." (formerly Mary Margaret M., but then a married woman), "all of them late of Calcott Hall, must receive each 50*l.*, the residue to fall into my above-named executor's hands." There was a son, Thomas, born between Samuel and Mary, but there was no son named only John; the second nephew, John Henry, died unmarried; the others survived him: — *Held*, affirming a decision of the Master of the Rolls, and Lord Justice Turner (Lord Justice Knight Bruce having dissented), that Thomas was not entitled to any share of the residue. — *Mostyn v. Mostyn*, 155.
2. A testator was in 1792 possessed of freehold lands, and of an equitable fee

in a copyhold estate. He made a will, by which *he subjected the *1012 whole of his real estate in aid of his personalty, to the payment of his debts, and subject thereto, he gave all his "messuages, tenements, lands, hereditaments, and premises, with the buildings, mines, &c.," thereon and therein, over which he had a disposing power, to trustees, for five hundred years, out of the rents, &c., or by assignment, &c., of the term, to raise money to pay his debts, legacies, and, after payment thereof, to apply the rents, &c., or the remainder of the estate, to the use of his grandson C. W. C., on his attaining twenty-three, and to raise 1000*l.* to pay to his other grandson R. C., on his attaining twenty-three. And in order that these two grandsons might be properly educated, the testator directed that the sum of 200*l.*, until C. W. C. should attain twenty-three, and 100*l.* afterwards, and till R. C. should attain twenty-three, should be raised for that purpose. By the custom of the manor the copyholds which the testator possessed would descend to his customary heir or heirs, the tenure being gavelkind. The testator had not made any surrender of them to the use of the will. When he died in 1799, his only daughter (the mother of C. W. C. and R. C.) was his customary heir, and on her death, they became her customary heirs: — *Held*, that the testator's copyhold interest did not pass by the will, but descended to his customary heir: — The annuities created for the maintenance of the grandsons had fallen into arrear: — *Held*, that they were charged on the real estate itself, and not merely on the annual rents and profits: — *Held* also, that the annuities did not carry interest. — *Torre v. Browne*, 555.

3. The suit to administer the will was instituted in 1800; a great many delays had taken place; it is a rule of equity to give interest, where there has been unnecessary and vexatious delay; but as the House could not attribute the delays in this case to any particular party in the suit, no interest was allowed. — *Id.*
4. A testator directed that a certain portion of his property should be invested, and the dividends, &c. paid among his brothers and sisters and their children; that the residue should accumulate for twenty-one years after his death, at the end of which time the accumulated fund (to which the testator gave the name of his "capital property") was to become the property of "the then nearest of kin to myself in the male line in preference to the female line." The "inheritor" of this capital property was to assume the testator's surname "if not of that surname," and was to "bear and use the arms, with the differences *which may have *1013 been at any time previous to my death assigned to me." The testator, in a memorandum, dated some time afterwards (and which was admitted to proof as a codicil), directed that his gold medal given for the capture of Java, should descend with "the patent of my armorial bearings to the inheritor of my capital property." The Crown, in consideration of the distinguished services of the testator, had, between the date of the will and of the codicil, made a grant of arms to the testator "and his descendants," and failing them, then (with the omission of emblazoning the Java medal) "to be borne by the descendants of his late father, with due and proper differences." At the date of the will and at the death of the tes-

tator he had two brothers and several sisters living. The two brothers (unmarried), the unmarried sisters, and two of the married sisters died within the twenty-one years, leaving one married sister and the sons and daughters of her married sisters and of herself surviving. B., the son of a paternal uncle of the testator, claimed the "capital property" of the testator as being the only person who answered the description of "the nearest of kin in the male line":—*Held*, that he was not entitled, the words of the will not restricting the gift to a male claiming through males.—*Sayer v. Bradley*, 873.

The married sister was held entitled to the "capital property."

WITNESS. See EVIDENCE.

WORDS, MEANING OF.

It is a question to be determined by the particular words of each will, whether a gift of "surplus" or "residue" means surplus or residue properly so called, or a mere proportional share of a particular fund. Where, after the gift of a fund charged with certain payments, the words were, "and the overplus which the said, &c. do produce more than all these disbursements do amount to (which I do find and compute to be about 60*l.* per annum"), they were held to mean surplus, and not proportional share.—*Mayor, &c. of Southmolton v. The Attorney-General*, 1.

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